UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10

WARRIOR MET COAL MINING, LLC

Employer

and Case 10-RD-315651

TONY MORGAN, an Individual

Petitioner

and

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA

Union

POST-HEARING BRIEF OF INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA

I. INTRODUCTON

The International Union, United Mine Workers of America ("UMWA" or "Union"), by its undersigned counsel, hereby submits its post-hearing brief urging dismissal of the decertification petition filed in this matter under the well-settled legal principles recently reaffirmed in *Rieth-Riley Construction Co.*, 371 NLRB No. 109 (2022), and most recently applied in *Wendt Corporation*, 371 NLRB No. 159 (2022). As explained below, the severe, pervasive, and continuous unfair labor practices committed by the Employer, Warrior Met Coal Mining, LLC ("Warrior Met"), over the entirety of the Union's unfair labor practice strike and after its unconditional offer to return to work represents precisely the type of "hallmark violations" of the Act discussed in *Rieth-Riley* that

requires dismissal of a decertification petition under the four-factor test set forth in *Master Slack Corp.,* 271 NLRB 78 (1984), because such conduct would "objectively taint employee sentiment towards the union" and have a "pervasive effect on the bargaining unit." *Rieth-Riley*, 371 NLRB, at *5, fn. 24, *6, fn.34, *citing Veritas Health Services v. NLRB,* 895 F.3d 69, 83 (D.C. Cir. 2018); *Champion Enterprises*, 350 NLRB 788, 792, fn.19 (2007); *Overnite Transportation*, 333 NLRB 1392, 1394-97 (2001).

In this case, even before the *Saint Gobain*[1] hearing directed by the Region, no genuine question existed concerning Warrior Met's unlawful conduct and whether such conduct would have "a reasonable tendency to cause employee disaffection with the Union." *See Wendt Corporation*, 371 NLRB No. 159, at *2. Indeed, the General Counsel has already found merit concerning Warrior Met's failure to provide the Union with the relevant and necessary information it sought in order to meaningfully bargain a successor contract – a failure that persists to this day. Moreover, the General Counsel has also found merit to four of the pending unfair labor practice charges filed by the Union on behalf of its 41 Union members who were unlawfully terminated by Warrior Met during the Union's unfair labor practice strike – many of whom were local Union leaders, as well as strong rank-and-file supporters and leaders of the Union's strike.[2] Numerous additional unfair labor practice charges filed during the last year are also outstanding and pending investigation.

This conduct alone is certainly the "type that reasonably tends to have a negative effect on union membership and to undermine the employees' confidence in the effectiveness of their

[1] *Saint Gobain Abrasives*, 342 NLRB 434 (2004).
[2] As of the date of this filing, the Region has yet to complete its investigation into the majority of the 41 individual unfair labor practice charges, thus there is a strong likelihood that the Region will find merit in additional cases to the four referenced herein.

selected collective bargaining representative." *AT West Systems*, 341 NLRB at *61. The perception that the Union could not effectively bargain a successor contract (or even secure the information needed to do so), combined with its inability to prevent the Employer from terminating local Union leaders, as well as its most ardent rank-and-file supporters during the strike could easily lead a reasonable person to conclude that the Union is weak and ineffective – thus causing disaffection towards the Union and an erosion of support among the bargaining unit.

The evidence presented at the *Saint Gobain* hearing (through both documents and witness testimony) only served to further solidify the Union's position that a merit-determination dismissal must be issued here. At the hearing, the Union's witnesses detailed the devasting impact Warrior Met's unlawful conduct has had on the morale of the bargaining unit, its ability to effectively communicate with its members, and ultimately the significantly diminished view the bargaining unit holds of the Union and its ability to effectively represent the bargaining unit.

The record evidence establishes that Warrior Met undertook a deliberate, persistent and calculated scheme to attack the Union on two separate, but connected, fronts in order to sow discontent, frustration and anger towards the Union from its bargaining unit members that would eventually metastasize and create precisely the toxic atmosphere it was seeking, which would inevitably lead to the tainted decertification petition at issue here. Warrior Met first attacked the Union at the bargaining table by steadfastly refusing to provide the relevant and necessary information it sought to intelligently bargain a successor agreement (including addressing issues of utmost important to its membership like Warrior Met's use of contractors and the Union's inability to police the Employer's abuse of this practice). Warrior Met's unlawful conduct at the bargaining table had the intended effect, slowly (but steadily) causing bargaining unit members to question the effectiveness of the Union.

Once Warrior Met successfully opened up small cracks and fissures in member support for the Union, it then launched the second prong of its attack – by announcing its plans to target bargaining unit members for termination, but again refusing to provide the Union (for nearly a year of bargaining) with information concerning who would be targeted, how many of its members would be targeted, or even exactly what conduct Warrior Met would rely on to discharge members. This unlawful conduct injected fear and doubt into an already frustrated and angry bargaining unit, which once again directed its discontent towards the Union – blaming it for not being able to provide more information about Warrior Met's threat or protection from it.

Next, Warrior Met made good on its threat, discharging 41 bargaining unit members – including the presidents of the UMWA Local Unions participating in the unfair labor practice strike and numerous vocal Union supporters. This unlawful conduct, combined with Warrior Met's previous unfair labor practices achieved the desired result – support for the Union began to further erode, as evidenced by substantially diminished attendance at Union rallies and marches, as well as a decreased presence of members on the picket line – with the Union being asked if it could not protect the local leaders, how were rank-and-file members expected to believe the Union could protect them. *Id*. at 723.

With its plan to eliminate the Union fully in place, Warrior Met launched one more attack against Union support in the lead up to (and during) the unconditional return to work of bargaining unit members. In response, the Employer continued its practice of refusing to provide the Union with detailed information concerning the return-to-work protocols and their timing, which again led the Union to appear uninformed and ineffective to its membership. Warrior Met combined this familiar tactic with a wage increase, improved benefits, and the provision of free meals to returning

bargaining unit members. Such conduct was intended to send a clear message to returning bargaining unit members – you do not need the Union.

At the hearing, Warrior Met attempted to deflect attention from its pattern of severe and pervasive unlawful conduct that, as discussed above, evidenced a premeditated attack on the Union in order to erode support from its membership. Warrior Met's repeated attempts during the hearing to compare its unlawful conduct to the Union's misconduct under the guise of exploring the second *Master Slack* factor – the "nature" of the underlying violation – is unavailing. Moreover, Warrior Met's obvious effort to blame the Union for member disaffection does not operate to remove the taint of the pending petition.

The Employer's unlawful conduct - as part of its calculated attack to rid itself of the Union – has the tendency to lead to employee disaffection, even if other factors (not involving Warrior Met) may also be present. That is the relevant inquiry to be performed - whether the Employer's misconduct could have a "meaningful impact" on employee disaffection towards the Union so as to "taint" an election and prevent it from representing a "free and fair" choice by the bargaining unit members. *See Master Slack*, 271 NLRB at 84; *Rieth-Riley*, 371 NLRB, at *7, fn. 35. *See also NTN Bower Corporation*, No. 10-CA-38816, 2012 BL 493621, * 10 *citing Comau, Inc.*, 357 NLRB No. 185, slip op. at p. 6 (January 3, 2012) (Board "has never held that in order for a nexus to be established under the *Master Slack* test, the employer's unfair labor practices must be the *only* factors causing disaffection.")

Like Warrior Met, Petitioner offered no evidence at the hearing relevant to the objective nature of the *Master Slack* test and the "meaningful impact" of the Employer's unlawful conduct on employee disaffection. Instead, Petitioner spent the entirety of the *Saint Gobain* hearing focused on the subjective state of mind of the employees he called as witnesses in a misguided and

pointless effort to demonstrate that Warrior Met's unlawful conduct did not cause the disaffection that these specific individuals felt toward the Union.

Nevertheless, even these witnesses acknowledged that Warrior Met's unlawful conduct was the topic of conversation among the bargaining unit members. Thus, Petitioner's witnesses accomplished nothing but to further confirm that Warrior Met's conduct permeated the entire bargaining unit and reasonably could be the cause of employee disaffection towards the Union, regardless of whether Petitioner or those who never supported the Union and worked behind the picket line felt the same way. *See Rieth-Riley*, 371 NLRB, at *6 ("Crucially, *Master Slack* is an objective test: the Board does not consider testimony or evidence regarding employees' subjective reasons for supporting the petition.")

Here, as explained below, Warrior Met's severe, pervasive and unremedied unfair labor practices and their long-lasting effect on the bargaining unit make a meaningful choice to retain the Union as their collective bargaining representative impossible. Therefore, the decertification petition must be dismissed.

II. Relevant Factual Background

A. The Union's Information Request and Warrior Met's Failure to Respond

Prior to April 1, 2021, Warrior Met and the Union maintained and enforced a collective bargaining agreement covering a bargaining unit of approximately 920 hourly workers at Warrior Met's coal mining facilities in Alabama. *See* Union Exhibit 4, at p. 3, ¶ 8 (ULP Complaint in NLRB Case No. 10-CA-274900); Union Exhibit 15 (2016 Collective Bargaining Agreement Between the Union and Warrior Met), *see also* Transcript from May 4-11, 2023 Hearing, at pp. 24 (Testimony of Brian Sanson, UMWA Secretary-Treasurer) and 739 (Testimony of James

Blankenship, UMWA District Representative). The parties' collective bargaining agreement expired on April 1, 2021. *See* Union Exhibit 4, at 3, ¶ 9.

On March 19, 2021, before the parties' collective bargaining agreement expired, the Union hand-delivered a letter to Warrior Met requesting certain necessary and relevant information, broken down into comprehensive and detailed categories, that the Union needed to conduct meaningful negotiations with Warrior Met – including preparing proposals and evaluating and responding to proposals made by the Employer. *See* Union Exhibit 2; Union Exhibit 4, ¶ 10 (ULP Complaint); Transcript at 780 (Blankenship testimony). James Blankenship, the Union's District representative and a member of the Union's bargaining team, explained that the Union prepared its detailed information request after it became apparent to the Union that it would not be able to bargain a contract acceptable to the membership without the information which Warrior Met had consistently been refusing to provide in response to oral requests made by the Union during negotiations. *See* Transcript at 781.

After Warrior Met continued its refusal to provide the Union with the information it requested, even after the Union submitted its written request, the Union filed an unfair labor practice charge. *See* Union Exhibits 2 and 3. In response to this charge, the Region issued Complaint on September 17, 2021. *See* Union Exhibit 4. A virtual hearing occurred before Administrative Law Judge Melissa M. Olivero from March 14 through March 18, 2022. That matter has been fully briefed and the parties await a decision.

In her brief to the Administrative Law Judge, the General Counsel addressed Warrior Met's practice of providing non-responsive "responses" to the Union's information request. Specifically, the General Counsel noted that the record evidence established that Warrior Met "failed to demonstrate that its 202 responses over the course of eleven months satisfied its duty to provide

information, as a number of requests were unanswered, others were only partially fulfilled, albeit untimely, while others were fulfilled but in redacted form with no discernible privilege established." *See* Union Exhibit 5, at p. 40. The General Counsel's brief further stated that evidence adduced at trial demonstrated that Warrior Met's manner of "trickling in unorganized clusters of information without specifying the nature of the response is not good faith production of documents but is an abuse of the process of production used to conceal relevant information and render it useless to the Union." *Id*. at 54.

Warrior Met's production of documents by "dribs and drabs" continued throughout the parties' negotiations, even after the unfair labor practice hearing, and continues to date. *See* Transcript, at 36 (Sanson Testimony). Brian Sanson, the Union's Secretary-Treasurer and chief negotiator explained at the hearing that Warrior Met continues to respond to the Union's pending information request in "individual tranches" of mostly useless and difficult to understand documents. *See* Transcript, at 36. He further confirmed what the General Counsel criticized in her post-hearing brief as information being released by Warrior Met in "one tiny [d]ribble after another, after another, after another" which renders Warrior Met's response to the Union like a "death by 1,000 knives." *See* Transcript, at 36. *See also* Union Exhibit 5 (April 24, 2023 letter from Kelli Gant to Brian Sanson indicating more than 450 "responses" from Warrior Met to the Union's outstanding information request).

Mr. Sanson explained that Warrior Met's ongoing refusal to provide the Union the information it requested for meaningful bargaining has been "a black cloud over the negotiations since [they] started." *Id*. at 40. He further testified concerning the impact Warrior Met's conduct has had on the Union's bargaining unit, stating that he has had "pretty harsh" conversations with bargaining unit members about why the Union cannot get the information it needs from the

Employer. *Id*. These members have expressed their frustration and dismay to Mr. Sanson over why it's been two years and the Union is still trying to get the information it requested. *Id*. Mr. Sanson further explained that from the members' perspective, Warrior Met's refusal to provide information is seen as a "failure" on the Union's part. *Id*. at 41. Mr. Sanson also testified that members expected answers from the Union, and when the Union could not provide those answers because it did not have information from the Employer, that failure damaged the Union's reputation with its members. *Id*. at 77-78.

At the hearing, Mr. Blankenship likewise testified to the continuing impact Warrior Met's conduct has had on the bargaining unit. He first explained that without the information the Union requested, it could not get a "big picture" of everything which prevented it from reaching an agreement its members would ratify. *Id*. at 704. Mr. Blankenship also explained that he received questions from members "every day" about how the negotiations were going. *Id*. He estimated that he spoke to "hundreds" of members. *Id*. at 707.

Mr. Blankenship testified that he would respond to these questions by telling the members that the Union was trying to negotiate but the Employer would not provide the information it requested. *See* Transcript, at 705. In response, the members would tell him that the Union needs to force the Employer to give the Union the information. *Id*. Although Mr. Blankenship tried to explain the process to the bargaining unit members, they did not accept his explanation and still believed the Union should be able "to go in [to the Employer] and get it." *Id*. at 706.

Mr. Blankenship further explained that failure to obtain information led the bargaining unit members to become frustrated with the Union, confronting and telling him that they had worked five years under an awful contract that made Warrior Met millions and they were not "asking for the world." *Id*. at 706. Mr. Blankenship confirmed that this frustration continued to the present

day in his conversations with members. *Id*. at 707. He stated that because of the Union's inability to obtain the information bargaining unit members think it should be able to get, the members' morale is "in the toilet." *Id*. He also testified that this frustration likely contributed to some members crossing the picket line and ending their support for the Union's unfair labor practice strike. *Id*. at 707-08.

B. The Parties' Tentative Contract, the Union Explanation Meeting, and the Overwhelming Vote by Union Members to Reject the Tentative Agreement

In addition to Warrior Met's calculated and continuing non-production of documents, it also repeatedly insisted during the parties' initial bargaining sessions that the Union did not need the information it was requesting because it claimed that the bargaining unit members were "happy with what they had the last five years" and were "okay with the contract they had." *See* Transcript, at 693. As Mr. Blankenship explained at the hearing, the parties "kept meeting, and [Warrior Met] kept telling us we didn't need the information" and, eventually, the Union got to the point where it said, "let's see if we do." *Id*. at 694.

Consequently, the Union made some small changes to the parties' previous contract, like a small pay increase, along with other minor changes it could agree to without receiving the information it had requested from Warrior Met. *See* Transcript, at 749. The Union then proceeded to present this tentative agreement, which was "not much more than" the previous contract, to its members at an explanation meeting. *Id*. At that meeting, the Union was only able to get through the first few pages of the tentative agreement before members walked out in anger and frustration. *Id*. at 696.

Mr. Blankenship testified that the members stated that they thought the tentative agreement was a "sorry contract" and "no better" than what they already had. *Id*. at 750. The members

overwhelmingly rejected the parties' tentative contract, with approximately 95% of the membership voting against it. *Id*. at 111.

C. Warrior Met's Threat During Bargaining to Discharge Employees for Misconduct and its Prolonged Refusal to Identify Whom It Would Discharge or What Underlying Conduct it Planned to Rely on to Discharge Bargaining Unit Members

In response to the Union's members rejecting the tentative agreement, the parties continued to negotiate for a successor agreement. In or around October 2021, Warrior Met first suggested during bargaining that it planned to terminate certain striking bargaining unit members for purported misconduct. *Id* at 43, 708-09. The Union immediately asked Warrior Met to provide details and information concerning its planned termination of bargaining unit members. *Id*. at 43-44, 709-10.

Like its failure to properly respond to the Union's previous information requests, Warrior Met also refused to provide information to the Union when it requested that the Employer provide details about the impending discharges including how many bargaining unit members it was planning to discharge, who they were, and the specific conduct it was relying on to support its discharge decisions. *Id*. at 44, 710.

Subsequently, Warrior Met presented a side letter to the Union as part of the parties' negotiations seeking to obtain the unfettered right to discharge bargaining unit members for purported misconduct – thus preventing them from returning to work after the strike concluded. *See* Transcript, at 44-45. The Union objected to the proposed side letter for numerous reasons – including because it would require the Union to waive its legal right to represent members whom Warrior Met discharged. *Id*. at 45.

At the time Warrior Met proposed the objectionable side letter, it still had not provided the Union with the previously requested information regarding whom it intended to terminate, how

many bargaining unit members it intended to target or even the specific conduct it planned to rely on in support of these terminations. *Id*. at 45-46. While the Union continued to request information about the details of Warrior Met's planned discharges, it also proposed several different options to address the matter, including a suggestion that the affected members be allowed to submit their discharges to arbitration, but Warrior Met refused such suggestions. *Id*. at 46. As a result, the Union filed yet another unfair labor practice charge. *See* Union Exhibit 6.[3]

Like Warrior Met's refusal to provide the Union with a meaningful response to its prior information requests, its plan to discharge an unknown number of members for undisclosed reasons caused members to lose faith in the Union's effectiveness. Mr. Sanson explained that because Warrior Met provided no information to the Union about the planned discharges, the Union could not address the many rumors circulating among its members over who was going to be targeted, or what conduct would lead a member to be terminated. *Id*. at 50.

Mr. Blankenship further testified that the Union's members were afraid and frustrated with the Union because (once again) it could not answer their questions – this time about who was to be terminated and the conduct that could lead to others being included in the group that was being targeted by Warrior Met. *See* Transcript, at 711. Mr. Blankenship estimated that he spoke to hundreds of members about their concerns and frustrations with the Union. *Id*. at 712. He stated that the Union's inability to provide answers to its members negatively impacted the morale of the bargaining unit members, which he characterized as "awful." *Id*. at 713. He explained that this caused the members to avoid picket line duty and not to attend Union rallies. *Id*. at 712-13. In

[3] At the hearing, the hearing officer noted that the charge the Union included as Union Exhibit 6 was not a docketed version of the charge. *See* Transcript, at 47. As a result, the hearing officer stated that the Region would simply take judicial notice of the docketed charge (10-CA-300553). *Id*.

fact, Mr. Blankenship stated that it was necessary for the Union to switch its rallies from weekly to biweekly because members were not participating. *Id*. at 714.

D. Warrior Met's Termination of 41 Bargaining Unit Members, Its Continued Refusal to Provide the Purported Underlying Conduct to Support the Terminations, and the pending ULPs.

Nearly a year after the Union first asked Warrior Met to identify bargaining unit members it would not allow to return to employment after the strike, Warrior Met provided the Union with a letter dated August 29, 2022, with a list of 40 individuals who it claimed would "not be entitled to reinstatement" based on unspecified allegations of misconduct. *See* Union Exhibit 7.[4] Warrior Met still failed to provide the Union, or the targeted members, with the specific facts to support its termination decisions. *See* Transcript, at 716-18. In its letter, Warrior Met also stated that it reserved the right to "conduct additional investigations and supplement or amend the list." *Id*. at Union Exhibit 7. Such a statement left the Union and the bargaining unit members with further uncertainty about whether the list of 41 names would grow to include more individuals for unspecified misconduct.

In response to Warrior Met's termination decisions, the Union filed additional unfair labor charges on behalf of each of its 41 members who were the subject of this unlawful conduct. *See* Union Exbibit 8.[5] Mr. Sanson explained that Warrior Met's unlawful conduct had a particularly strong impact on the bargaining unit because many of the individuals targeted for termination served as local Union leaders, or safety committee members or were generally outspoken in their support for the Union. *See* Transcript, at 52.

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[4] The list of 40 discharged employees was increased to 41 when Warrior Met informed the Union that it would not allow James Banks to return to employment. *See* Transcript at 51, 716.

[5] The Union requests that the Region take judicial notice of each of these 41 charges, as well as the fact that the General Counsel has found merit with respect to at least 4 of those charges to date. It is the Union's understanding that the investigation is ongoing with respect to all these charges.

Mr. Sanson also testified that Warrior Met's conduct in terminating the local Union leaders and other Union supporters has had a "crippling" impact on the Union and its membership. *Id*. at 57. Specifically, Mr. Sanson explained that many of the Union's members have turned their frustration on the Union over the 41 terminated employees. *Id*. at 58. The members have indicated that the Union should have been able to handle this matter and taken care of it. *Id*.

Indeed, Mr. Sanson testified that the Union's reputation with its members has sustained serious damage as a result of Warrior Met's unlawful terminations. *Id*. at 61. He also stated that in his 27 years as a union official he had never experienced the degree of hostility that he witnessed in local Union meetings discussing the 41 terminated members. *Id*.

Mr. Blankenship provided similar testimony concerning the impact of Warrior Met's unlawful terminations on bargaining unit members. He also explained that the members' morale was poor because they were looking to the Union for answers and the Union could not provide any. *Id*. at 721-22. He further stated that it affected the members' willingness to support the Union on the picket line and at rallies. They questioned how the Union could protect them if they were terminated when they could not even protect the local Union leaders. *Id*. at 723. Mr. Blankenship also explained that, like Warrior Met's refusal to provide necessary and relevant requested information required for collective bargaining, the members blamed the Union for not being able to obtain the underlying information concerning the 41 terminated employees from Warrior Met. *Id*. at 724.

E. Warrior Met's Additional Unlawful Conduct, Including Its Continued Failure to Provide Relevant and Necessary Information to the Union, the Union's Unconditional Offer to Return to Work, and Warrior Met's Unlawful Conduct Since the Union's Offer

On February 16, 2023, the Union notified Warrior Met of its unconditional offer to return to work. Less than one week prior to this offer, the Union filed another unfair labor practice

charge detailing additional unlawful conduct by Warrior Met. *See* Union Exhibit 9.[6] Among the unlawful conduct detailed by the Union, Mr. Sanson explained that Warrior Met refused to allow the Union to exercise its contractual and statutory right to inspect its mines as the Union was considering whether to make an unconditional offer to return to work. *See* Transcript at 72-73.

Mr. Sanson testified that the Union sought to access the mines for inspection purposes on approximately 40 different occasions and each time Warrior Met did not allow the Union access. *Id*. 73-74. He explained that the members viewed this as a failure by the Union to represent them in the same way as the Union does with other miners in different parts of the country. *Id*. at 74. Indeed, the preservation of safe working conditions at mine facilities is one of the critical hallmark functions that the UMWA provides to its members. Mr. Sanson stated that the Union's inability to gain access to the Warrior Met mines made the Union look "foolish" to its members. *See* Transcript, at 74.

Mr. Sanson also explained that the members became frustrated and angry at the Union again when it could not provide details to them about the logistics of their return to work because Warrior Met had failed to provide the Union with the information it requested about the return-to-work protocols. *Id*. at 76-77. This frustration with the Union based on the lack of information provided by Warrior Met made the Union look ineffective to its members and unable to represent them. *Id*. at 82. Mr. Blankenship provided similar testimony, explaining that in his interactions with members "they blamed [the Union] for what Warrior Met's doing." *Id*. at 738.

Finally, since the return to work, Warrior Met has continued to flout the law and violate the Act. As Mr. Sanson testified, Warrior Met continues its deliberate and calculated practice of failing

[6] At the hearing, the hearing officer indicated that the Region would take judicial notice of the Union's charge (10-CA-311946), recognizing that the copy of the charge identified as Union 9 was not a docketed copy. *See* Transcript, at 69-70.

to provide useful information in response to the Union's initial information request. *Id*. at 83. He explained that most recently Warrior Met provided the Union with a "data dump" of information that makes it "impossible" to use in a meaningful way. *See* Transcript, at 83. Additionally, Warrior Met has made unilateral changes to terms and conditions of employment following the Union's unconditional offer to return to work. *See* Board Exhibit 3. Specifically, Warrior Met has increased wages, made improvements to health care benefits, removed a box for submitting grievances and a bulletin board used by the Union to communicate with bargaining unit members. *See* Transcript, at 91-93 (Sanson Testimony).

III. ARGUMENT

A. The Decertification Petition Must be Dismissed

In *Rieth-Riley*, the Board confirmed the continued vitality of the merit-determination dismissal in cases where a Regional Director determines that pending unfair labor practice charges "pertain[ ] to conduct that, if proven, would undisputedly taint any subsequent showing of employee disaffection and so would preclude any proper basis for conducting an election, necessitating dismissal of the petition." *Rieth-Riley*, 371 NLRB, at *3. *Rieth-Riley* then applied the four-factor test set out in *Master Slack Corp.*, 271 NLRB 78, 84 (1984) and upheld the Regional Director's merit-determination dismissal of a decertification petition because there was a "causal connection" between an employer's unfair labor practice and employee disaffection underlying the decertification petition. *Id*. at 4-5.[7]

[7] The four *Master Slack* factors are*:* (1) the length of time between the unfair labor practices and the filing of the decertification petition; (2) the nature of the violation, including the possibility of a detrimental or lasting effect on employees; (3) the tendency of the violation to cause employee disaffection; and (4) the effect of the unlawful conduct on employees' morale, organizational activities, and membership in the union. *See Master Slack Corp.*, 271 NLRB at 84.

Well-settled and long-established precedent developed through both the NLRB and federal courts provides that "[t]he Board applies the *Master Slack* test to determine when a decertification petition should not be taken to reflect the voluntary choice of a bargaining unit's employees because it was signed in an atmosphere rendered threatening or coercive by an employer's unfair labor practices." *See Wendt Corporation*, 371 NLRB No. 159, at *2-3 (2022) *quoting Veritas Health Services v. NLRB*, 895 F.3d 69, 82 (D.C. Cir. 2018). As explained in *Rieth-Riley*, the "key to finding *Master Slack* causal nexus is whether the unlawful conduct had [ ] a pervasive effect on the bargaining unit." *Id*. at 5, fn. 24 *citing Veritas Health Services v. NLRB*, 895 F.3d 69, 83 (D.C. Cir. 2018); *Champion Enterprises*, 350 NLRB 788, 792 fn. 19 (2007).

Most recently, the Board in *Wendt Corporation* recognized that the focus of the *Master Slack* analysis is on "the objective evidence of the commission of unfair labor practices that has the tendency to undermine the Union, and not the subjective state of mind of the employees." *Wendt Corporation*, 371 NLRB No. 159, at *3, *quoting AT Sys. West, Inc.*, 341 NLRB 57, 60 (2004); *see also Overnite Transportation Co.*, 333 NLRB 1392, 1397, fn. 22 (2001) ("Except for the fourth factor, the *Master Slack* analysis weighs the objective tendency of the unfair labor practices to undermine union support, and evidence of the actual impact of the [e]mployer's unfair labor practices is not required."). As such, "the *Master Slack* inquiry calls on the Board to consider the nature and timing of the unfair labor practices as they bear on the **reasonable likelihood** of discouraging employees from continuing to support their union." *Wendt Corporation*, 371 NLRB No. 159, at *3 *citing Veritas Health Services*, 895 F.3d at 82 (emphasis supplied).

The Board's recent decision in *Wendt Corporation* outlines a helpful framework for performing the *Master Slack* analysis in considering whether a causal connection exists between an Employer's unfair labor practices and employee disaffection towards the Union that taints a

pending decertification petition and requires dismissal.[8] Importantly, the Board recognized the interconnected nature of the four *Master Slack* factors in performing the objective "causal connection" analysis. Specifically, the Board explained that "[b]ecause *Master Slack* factor 1, which examines the length of time between the unfair labor practices and the decertification petition is properly viewed in the context of whether unfair labor practices 'were of a more serious nature . . . and were disseminated throughout the bargaining unit, we commence our *Master Slack* analysis by examining the second and third factors of the test: the nature of the unfair labor practices and their tendency to cause employee disaffection from the union." *Wendt Corporation*, 371 NLRB No. 159, at *3.

The Board also emphasized, with respect to the temporal aspect of the first *Master Slack* factor, the mere passage of time – standing alone, cannot serve to lessen or sever the connection between an employer's unlawful conduct and employee disaffection. *Id*. at fn. 4 ("In *Veritas Health Services v. NLRB*, 895 F.3d at 83, for example, the District of Columbia Circuit approved the Board's finding that three years was too little time to ameliorate the effects of 'severe and pervasive' unfair labor practices."). In addition, *Wendt Corporation* reiterated the impact of unremedied unfair labor practices when considering the first *Master Slack* factor. Id. at *7 ("Where 'serious unfair labor practices remain unremedied . . . the passage of time, in and of itself, is not likely to dissipate their coercive effect." Instead, in such cases, "the passage of time magnifie[s] to employees the Union's powerlessness rather than ameliorate[s] it.") *quoting Overnite Transportation*, 333 NLRB at 1397.

[8] After recognizing the continued vitality of the merit-determination dismissal process and analysis under *Rieth-Riley*, the Regional Director for Region 3 of the NLRB recently dismissed a decertification petition in a case involving pending unfair labor charges against Starbucks Corporation, 03-RD-316974 (May 25, 2023).

In *Wendt Corporation* the Board also explained that, like the first *Master Slack* factor, the fourth factor – the effect of an employer's unlawful conduct on employee morale, organizational activities, and membership in the Union – cannot be viewed in a vacuum, but rather must be considered in the context of the other three factors, especially in light of "severe and pervasive unfair labor practices" by the Employer that remain unremedied at the time of the decertification petition. *Wendt Corporation*, 371 NLRB No. 159, at *8. The Board also recognized the difficulty in attributing the fourth *Master Slack* factor to Union conduct while there also exists severe, pervasive and unremedied unfair labor practices by the employer. *Id*. at *8-9 ("any disaffection with the contract or other aspects of Union representation would likely have been entangled with the sequence of unfair labor practices, including those deleteriously affecting working conditions of unit employees.").

Application of the *Master Slack* factors to the underlying facts in this case, using the analytical framework recently followed in *Wendt Corporation*, leads to one conclusion, the record evidence (even before the parties participated in a four-day *Saint Gobain* evidentiary hearing) clearly establishes a causal connection between Warrior Met's severe, pervasive and unremedied unfair labor practices and employee disaffection towards the Union. Therefore, like in *Wendt Corporation* and *Rieth-Riley*, the decertification petition is tainted and must be dismissed.

1. Warrior Met's Severe, Pervasive and Unremedied Unfair Labor Practices Satisfy the Second and Third *Master Slack* Factors

Warrior Met's deliberate, persistent, and continuing refusal to provide the Union with relevant and necessary information it requested over the course of negotiations undoubtedly has a "tendency to undermine the Union" in the eyes of its members. There also is a reasonable likelihood that such conduct could discourage employees from continuing to support their union.

This is particularly true in this case given the fact that Warrior Met's unlawful conduct remains unremedied.

As discussed above, Warrior Met's unfair labor practices with respect to the Union's information requests were recently litigated and a decision remains pending from the Administrative Law Judge. Moreover, as previously noted, in her post-hearing brief, the General Counsel concluded that the evidentiary record demonstrated that Warrior Met "failed to establish that its 202 responses over the course of eleven months satisfied its duty to provide information, as a number of requests were unanswered, others were only partially fulfilled, albeit untimely, while others were fulfilled but in redacted form with no discernible privilege established." *See supra* at 7-8.

The General Counsel further stated that Warrior Met's manner of "trickling in unorganized clusters of information without specifying the nature of the response is not good faith production of documents but is an abuse of the process used to conceal relevant information and render it useless to the Union." *Id*. at 54. Brian Sanson, the Union's Secretary-Treasurer and chief negotiator, confirmed at the hearing that Warrior Met's unlawful conduct has continued unabated even after the unfair labor practice trial. Warrior Met continues to respond to the Union's pending information request in "individual tranches" of mostly useless and difficult to understand documents. *See supra*, at 8. He further confirmed Warrior Met's ongoing practice (determined to be unlawful by the General Counsel) of providing responses to the Union's information requests in "one tiny [d]ribble after another, after another, after another" which renders Warrior Met's response to the Union – in Mr. Sanson's view - like a "death by 1,000 knives." *Id*.

The Board has found that a continuing refusal to provide the Union with requested relevant and necessary information over the course of bargaining satisfied the second and third

Master Slack factors. Such unlawful conduct and the Union's subsequent inability to communicate to its members any progress in either securing the requested information or in the underlying negotiations could reasonably lead members to consider the Union to be ineffective or not fully communicating to them. *See e.g.*, *Ardsley Bus Corporation, Inc.*, 357 NLRB 1009, 1013 (2011) ("The nature of the violations would tend to undermine the Union in the eyes of unit employees. . . . the repeated failures to provide the Union with presumptively relevant information necessary for its representational and bargaining obligations.").

In *Ardsley Bus Corporation, Inc.*, the employer's "failure to provide relevant information that the Union requested persisted throughout the year preceding the [decertification] petition." *Id*. at 1012. Here, according to the General Counsel's unfair labor practice complaint, Warrior Met's unlawful conduct in refusing to provide the Union with relevant and necessary information dates back to May 3, 2021, and *continues to date*. *See* Union Exhibit 4, at ⁋⁋ 11-37. (emphasis supplied). As such, Warrior Met's continuing and unremedied unlawful conduct is severe and pervasive, thereby satisfying the second and third *Master Slack* factors.

Similarly, Warrior Met's threat to terminate unnamed bargaining unit members for unspecified misconduct, its refusal to provide information to the Union concerning its unlawful conduct, and its subsequent termination of 41 bargaining unit members could reasonably be viewed as having a detrimental and lasting effect on employees, while also tending to cause employee disaffection from the Union. *Wendt Corporation*, 371 NLRB No. 159, at *5 ("It is likewise a matter of settled law that threat of job loss is a hallmark violation which has a 'detrimental and lasting effect on employee' under the *Master Slack* analysis.") *quoting Tenneco Automotive, Inc. v. NLRB*, 716 F.3d 640, 650 (D.C. Cir. 2013). The Board reached the same conclusion when presented with the discharge of only one union supporter, rather than the 41 targeted by Warrior

Met here. *Beverly Health and Rehabilitation Services, Inc.* 346 NLRB 1319, 1321 (2006) *citing Penn Tank Lines Inc.*, 36 NLRB 1066-68 (2001)("in particular, Respondent's discharge of an active union supporter was 'exceptionally coercive and not likely to be forgotten' and would likely 'reinforce the employees' fear that they will lose employment if they persist in union activity.'" *See also Goya Foods of Florida,* 347 NLRB 1118,1121 (2006)("The Respondent's discharge of three active union adherents and its suspension and underemployment of a fourth were hallmark violations that were highly coercive and likely to remain in the memories of employees for a long time."). Such conduct and the Union's seeming inability to effectively respond to it, as demonstrated at the hearing, only serves to further erode the Union's standing in the eyes of its membership and, thus, makes it more reasonable that members will be disaffected from the Union. *See D&D Enterprises, Inc.*, 336 NLRB No. 76 (2001) ("Discriminatory discharges of employees because of their union activities strike at the very heart of the Act. Their lasting impact, including the likelihood of their causing employees to defect from unions and their tendency to undermine a union's majority status by discouraging union membership and deterring organizational activity, is well settled.") (*quoting Olson Bodies, Inc.*, 206 NLRB 779, 779 (1973)).

This is particularly true here, where numerous individuals Warrior Met terminated were local Union officers, leaders or vocal rank-and-file union advocates. *See Penn Tank Lines*, 336 NLRB 1066 (2001) (It is "well settled that an employer's discharge of an active union supporter is exceptionally coercive."). As the Board recently reaffirmed in *Wendt Corporation*, the targeted discipline by an employer of recognized union leaders "is a particularly indelible reminder to other unit employees of the negative consequences that befall union adherents." *Wendt Corporation*, 371 NLRB No. 159, at *5.

Moreover, it is undisputed that Warrior Met's unlawful discharge of 41 bargaining unit members remains unremedied. Although, it bears noting that, to date, the Region has found merit with respect to at least four of the unfair labor practice charges the Union filed on behalf of the 41 individuals unlawfully discharged by Warrior Met. For these reasons, Warrior Met's continuing unlawful conduct relating to the 41 discharged employees, including its refusal to provide the Union with information prior to and after these discharges, as well as the threats made by Warrior Met prior to its actual discharge decisions satisfy the second and third *Master Slack* factors.

Finally, the same can be said of Warrior Met's unlawful conduct related to the Union's unconditional offer to return to work because this conduct is also the "type that reasonably tends to have a negative effect on union membership and to undermine the employees' confidence in the effectiveness of their selected collective bargaining representative." *AT West Systems*, 341 NLRB at *61. Here too, (faithful to its calculated plan to undermine the Union), Warrior Met has refused to provide the Union with relevant and necessary information concerning the logistics of how it planned to bring bargaining unit members back to work and when individual members could expect to return. In addition, Warrior Met has unlawfully provided wage increases, improvements in health benefits and other employment benefits (like increases in free meals) and presented these changes as being unilaterally provided without any involvement by the Union. *See Penn Tank Lines*, 336 NLRB 1066, 1067 (2001)("Where unlawful employer conduct shows employees that their union is irrelevant in preserving or increasing their wages, the possibility of a detrimental or long-lasting effect on employee support for the Union is clear.").

For the reasons discussed above, and consistent with the guidance most recently provided in *Wendt Corporation*, 371 NLRB No. 159, the substantial evidence of Warrior Met's severe and pervasive unfair labor practices including multiple "hallmark violations" fully satisfies the second

and third factors of the *Master Slack* analysis and clearly favors a finding that Warrior Met's unlawful conduct tainted the decertification petition.

2. Given the Severe, Pervasive and Continuing Nature of Warrior Met's Unlawful Conduct the First *Master Slack* Factor is Also Satisfied

As an initial matter, the Union submits that given the unremedied nature of all Warrior Met's unlawful conduct, no legitimate argument can be made that any of this conduct is too attenuated to the decertification petition so as to establish the required causal connection. Nevertheless, in light of the severe and pervasive nature of Warrior Met's unlawful conduct, the passage of time from the initial unlawful conduct to the decertification petition in no way serves to lessen its impact or suggest that there is not a causal connection between this unlawful conduct and employee disaffection at the time of the decertification petition. *See Wendt Corporation*, 371 NLRB No. 159, at *7 ("Where 'serious unfair labor practices remain unremedied . . . the passage of time, in and of itself, is not likely to dissipate their coercive effect." Instead, in such cases, "the passage of time magnifie[s] to employees the Union's powerlessness rather than ameliorate[s] it.") *quoting Overnite Transportation*, 333 NLRB at 1397.

In *Wendt Corporation*, the Board refused to find that a period of two years and nine months between some of the employer's unlawful conduct and the decertification petition was enough to question the causal nexus between that conduct and the petition. *Wendt Corporation*, 371 NLRB No. 159, at *6. The Board explained that the passage of time was not dispositive because the employer's unlawful conduct included "multiple hallmark violations that were pervasive throughout the unit." *Id*.

Moreover, the Board further reasoned that these "violations are of particularly long-lasting effect because they involved enduring conduct" and the "threat of job security that is an essential feature of many of the violations [ ] is particularly resistant to temporal amelioration." *Id*. The

Board also noted that it (and the courts) "have found a causal nexus established even when time periods exceeding the instant case are present where the unfair labor practices have been shown to be serious and widely disseminated in the bargaining unit." *Id*. *citing Veritas Health Services*, 895 F.3d at 83 (causal nexus still established after three-year period because of the effects of respondent's "severe and pervasive" unfair labor practices); *United Supermarkets v NLRB*, 862 F.2d 549 (5th Cir. 1989) (decertification petition had been tainted by unremedied unfair labor practices which had occurred more than five years before petition); and *Overnite Transportation Co.*, 333 NLRB 1392 (Board found causal nexus under *Master Slack* when nearly four years had elapsed.).

Here, measuring from Warrior Met's unlawful refusal to provide information as set forth in the unfair labor practice Complaint, approximately 1 year and 11 months passed between Warrior Met's initial unlawful conduct and the filing of the decertification petition. During the intervening period, Warrior Met has persisted in its refusal to provide information as discussed above. Moreover, like the employer in *Wendt Corporation*, Warrior Met has engaged in numerous **additional** unlawful acts since it first refused to provide the Union with the information it sought.

Indeed, with respect to "hallmark violations" - the effect of which does not tend to lessen over time – Warrior Met has committed at least 41 violations – one for each of the unit members it unlawfully terminated. As previously stated, the impact of this unlawful conduct on the bargaining unit is particularly serious given that many of the terminated members were also Local Union officers and vocal rank-and-file supporters and participants in the Union's unfair labor practice strike. As such, Warrior Met's unlawful conduct, like the employer's conduct in *Wendt Corporation,* is severe and far-reaching – arguably affecting each member of the bargaining unit.

The impact of Warrior Met's conduct was addressed at the hearing by the Union's witness. The Union's District representative, James Blankenship, stated that Warrior Met's repeated statements during bargaining that it intended to discharge unnamed bargaining unit members for unspecified alleged misconduct left the entire bargaining unit "afraid" and "frustrated" with the Union for not being able to tell them who was being targeted by Warrior Met and what conduct could get them on the "list." *See* Transcript, at 710-13.

In addition, Warrior Met's threat of discharge and its subsequent discharge of 41 members led to a noticeable decrease in support for the Union as shown by the declining attendance at Union rallies and marches. *Id*. at 714. Mr. Blankenship explained that immediately after Warrior Met's unlawful discharges, member attendance dropped to such a degree at rallies that the Union stopped having weekly and only held them every two weeks. *Id*.

Finally, with respect to the first *Master Slack* factor, Warrior Met has "never repudiated its unlawful conduct, pledged to cease it, or remedied it." *Wendt Corporation*, 371 NLRB No. 159, at *6. Therefore, for this reason, as well as those discussed above, the length of time between Warrior Met's initial commission of unfair labor practices and the decertification petition does not undermine the concern that Warrior Met's unlawful conduct has tainted the instant decertification petition. The first *Master Slack* factor is satisfied.

3. The Fourth *Master Slack* Factor is Also Satisfied

As previously discussed, the fourth *Master Slack* factor – the effect of an employer's unlawful conduct on employee morale, organizational activities, and membership in the Union – must be considered in the context of the other three factors, especially when "severe and pervasive unfair labor practices" by the Employer remain unremedied at the time of the decertification petition. *Wendt Corporation*, 371 NLRB No. 159, at *8. *See also United Supermarkets, Inc.* 287

NLRB 119, 120-21 ("[T]he underlying expression of support was itself unreliable as an indicator of uncoerced employee sentiment because it arose during a time when the Respondent had not yet fully remedied its many unfair labor practices."). The existence of unremedied unlawful conduct makes individualized expressions of disaffection not relevant to the *Master Slack* analysis because "any disaffection with the contract or other aspects of Union representation would likely have been entangled with the sequence of unfair labor practices, including those deleteriously affecting working conditions of unit employees." *See Wendt Corporation*, 371 NLRB No. 159, at *8-9. *See also Saint Gobain Abrasives, Inc.*, 342 NLRB 434, at fn. 2 (2004) ("The *Master Slack* test is an objective one . . . The relevant inquiry at the hearing does not ask employees why they chose to reject the Union."); *Denton County Electric Cooperative, Inc. d/b/a CoServ Electric*, 366 NLRB No. 103, slip op. at 3 fn. 10 (2018) (testimony from individual employees that employer unfair labor practices had no impact on their decision to sign decertification petition is irrelevant under the objective *Master Slack* analysis.); *Regency House of Wallingford, Inc.*, 34-CA-9895 (2003) ("Furthermore, individual employee sentiments cannot negate those findings of a causal relationship between the unlawful conduct and employee disaffection."); *Wire Products Manufacturing Corp.*, 326 NLRB 625, 627 fn. 13 (1998) ("In assessing the tendency of unlawful action to cause employee disaffection, the Board applies an objective, rather than a subjective, test. For this reason, actual knowledge by the employees of the unfair labor practices need not be shown.").

The above caselaw renders entirely irrelevant testimony offered by Petitioner and his parade of witnesses suggesting that Warrior Met's unlawful conduct was not the reason they signed the decertification petition, but rather it was the Union's conduct that motivated them to sign. Such

testimony plays no role in the objective *Master Slack* analysis, particularly in this case where Warrior Met's severe and pervasive unlawful conduct remains unremedied.

Despite the clear caselaw to the contrary, Petitioner spent parts of two hearing days presenting seven witnesses, each of whom was asked and provided testimony as to how they felt about the Union, why they signed the decertification and how their joining the decertification petition had nothing to do with Warrior Met's unlawful conduct – much of which they claimed to be unaware. Prior to the hearing, the Union pointed out that no hearing was necessary; that the Region already had a sufficient record to issue a merits-determination dismissal; and that if a hearing was nevertheless held, the hearing officer must not permit the entry into the record of the subjective evidence concerning employee disaffection proscribed by the relevant caselaw and irrelevant to the *Master Slack* analysis, lest the hearing devolve into a proxy vote for decertification. The Union renewed these objections a number of times during the hearing, especially when it became clear that Petitioner planned to elicit precisely the sort of irrelevant subjective evidence for which the Union had earlier raised its concerns.

The Region proceeded with the "evidentiary" hearing over the Union's objection, and also overruled the Union's renewed objections based on what it claimed was an interest in building a "complete record." As a result, the "complete record" sought by the Region is now replete with irrelevant testimony from which it appears the Petitioner will construct his entire case concerning employee disaffection. To the extent Petitioner seeks to rely on any of the testimony from his witnesses that discuss their individual and specific reasons for signing the petition such testimony must be stricken and disregarded by the Region when it performs the objective causal nexus test required by *Master Slack* and more recently considered and applied in *Rieth-Riley* and *Wendt Corporation*.

In contrast to Petitioner's irrelevant testimony with respect to the fourth *Master Slack* factor, the Union presented compelling testimony concerning the impact Warrior Met's unlawful conduct had on the morale, organizational activities, and membership in the Union. For example, Mr. Blankenship testified that Warrior Met's refusal to provide the Union with the information it requested and the Union's seeming inability to be secure this information left membership morale "in the toilet." *See* Transcript, at 707.

Likewise, Mr. Blankenship stated that member morale was "awful" in response to Warrior Met's threat to discharge unnamed members for unspecified misconduct and the Union's seeming inability to get answers for its members concerning this issue. *See* Transcript, at 712. As previously stated, this unlawful conduct by Warrior Met and its subsequent unlawful discharge of 41 Union members had such an adverse impact on member morale and support for the Union that weekly rallies were no longer held. *Id*. at 714.

The Union's Secretary-Treasurer provided similar testimony. Mr. Sanson explained that in response to Warrior Met's unlawful conduct Union members turned their frustration and anger towards the Union. He stated that in his 27 years as a union officer he had never experienced the level of hostility directed at the Union by its own members. *See* Transcript, at 61.

Mr. Sanson also explained that Warrior Met's unlawful conduct, including the discharge of 41 union members, had a "crippling" effect on the Union's ability to effectively represent its members, given that many of the discharged members were Local Union officers and Union leaders. *Id*. at 57. Such testimony establishes that there was a "reasonable likelihood" that Warrior Met's unlawful conduct would discourage employees from continuing to support their union. *Wendt Corporation*, 371 NLRB No. 159, at *3, *citing Veritas Health Services*, 895 F.3d at 82.

Indeed, Mr. Blankenship explained that terminated Local Union officers met resistance from members when they tried to solicit their support and participation at rallies. *See* Transcript, at 723. These members would question why they should participate and risk being discharged just like the Local Union officers. *Id*. Accordingly, the connection between Warrior Met's unlawful conduct in discharging the 41 strikers, including Local Union officers, and employee disaffection could not be more clear.

The Union's witnesses also testified with respect to the impact of Warrior Met's refusal to provide information to the Union on bargaining unit member morale and the Union's ability to represent members. Brian Kelly, the president of UMWA Local 2245 and one of the 41 discharged members, explained that the delay in reaching a successor agreement caused by Warrior Met's refusal to provide information left many of his members asking him why employees at other companies like John Deere and Kellogg's have short negotiation periods and return to work with a new contract, while the UMWA members still are on strike. *See* Transcript, at 862. Mr. Kelly further testified that the members complained that they were paying dues, but the Union was not working for them. *Id*. He explained that this led to members having lower confidence in the Union. *Id*. at 862-63.[9]

Jeff Fleenor, a rank-and-file member of the Union, conveyed a similar experience during his testimony. He stated that Warrior Met's discharge of 41 members, and the list being circulated with the names of the discharged members lowered the morale of bargaining unit members, particularly when the members thought that they were returning to work without the discharged

[9] As previously discussed, Mr. Blankenship provided similar testimony concerning the impact of Warrior Met's unlawful failure to provide information on member morale and disaffection to the Union. *See supra* at 9-10. He concluded that this disaffection and frustration caused member morale to be "in the toilet" and likely led some members withdraw their support for the Union and cross the picket line.

members. *See* Transcript, at 919. Similarly, Mr. Fleenor explained that many members were upset at the Union because they were returning to work without a contract after being on strike for so long. *Id*. at 920-21.

As for the Union's unconditional offer to return to work, Mr. Sanson explained that Warrior Met's established tactic of refusing to provide requested information to the Union also adversely impacted this situation and caused members to be disaffected and frustrated with the Union. Specifically, he explained that when the Union could not obtain requested information from Warrior Met about the specific logistics of its members' return, he could not answer member questions about when they were going to return and why the return was taking so long. *See* Transcript, at 77-78. Mr. Sanson stated that, once again, Warrior Met's failure to provide information led members to view the Union as ineffective and unable to represent them. *Id*. at 81-82.[10]

The Union's unconditional offer to return to work while the unlawful discharges of the 41 bargaining unit members remained unresolved further eroded confidence in the Union and support from its members. Both Mr. Sanson and Mr. Blankenship testified as to how the military rallying cry "no one left behind" had been embraced by the Union and its members concerning the 41 discharged members and led to the commonly expressed sentiment that the Union would not return to work without these members. *See* Transcript, at 52, 725. After Warrior Met's persistent unlawful conduct led to the Union's difficult decision to make its unconditional offer to return to work despite the 41 targeted members remaining discharged and unable to return to their jobs,

[10] Warrior Met's repeated and persistent refusal (over 40 times) to allow the Union to exercise its contractual and statutory rights to participate in mine inspections also served to undermine member confidence – making the Union look "foolish" to the bargaining unit. *See supra*, at 16-17. *See also* Transcript, at 34.

many of the Union's members became more frustrated and angry with the Union over what it again viewed as its ineffectiveness to represent them.

Mr. Blankenship testified that even though the Union repeatedly told its members it had no intention of leaving the 41 discharged members behind and it was still fighting for them, many members did not understand and responded by reminding the Union of its rallying cry and insisting the 41 discharged members should be returning with the rest of the bargaining unit and, if they were not, then they would refuse to return. *Id*. at 729. Mr. Sanson summed up the impact of Warrior Met's unlawful conduct when he explained that many members referred to the Union's decision to end its unfair labor practice strike as an offer of "unconditional surrender." *See* Transcript, at 63.

Given the above, the inescapable conclusion is that Warrior Met's unremedied and continuing unfair labor practice concerning its refusal to provide the Union with bargaining information contributed to the prolonged nature of the strike and made it more likely that the Union would eventually return to work without a contract. It is also reasonable to conclude that members would blame the Union for these events and there would be a tendency for them to be disaffected with the Union, as the Union witnesses observed and related in their testimony.

Even Petitioner's own witnesses acknowledge that Warrior Met's unlawful conduct was a topic of discussion among employees who crossed the picket line or who never supported the Union. *See* Transcript at 335, 372-76, 417-18, 469-70. As such, this testimony only serves to further buttress the likelihood that this conduct caused disaffection towards the Union in its perceived inability to respond.

Moreover, the adverse impact of Warrior Met's unlawful conduct on the morale of bargaining unit members could be seen in social media posts. The Union's Secretary-Treasurer

testified that his office routinely monitored social media sites for references to Warrior Met and the Union's unfair labor practice strike. *See* Transcript, at 84. In those posts, it is clear that Warrior Met's unlawful discharge of 41 members and how members perceived the Union's response to this conduct was impacting the opinion and reputation of the Union in the eyes of its membership. *See* Union Exhibit 10a-10d.

Petitioner's witnesses also acknowledged that Warrior Met's unlawful conduct was the subject of significant social media attention. *See* Transcript, at 375-76 (not bringing 41 discharged members back was a big issue for some of the returning strikers); 379 (Facebook discussion of whether 41 discharged members should come back or not); 417-18 (discharged 41 members were talked about by co-workers and on Facebook). Petitioner's witnesses also acknowledged that it was difficult in some instances to determine what caused employee disaffection and towards whom it was directed. *See e.g*. Transcript, at 335 (employees could not tell if Union or Warrior Met is lying about the status of negotiations).

For the reasons discussed above, and when considered in the context of the severe and pervasive nature of Warrior Met's unlawful conduct, the fourth *Master Slack* factor is satisfied and provides further support for a finding of a causal nexus between the decertification petition and Warrior Met's unlawful conduct. Therefore, because a causal nexus has been established under the objective *Master Slack* analysis, including application of all four factors, the instant decertification petition must be dismissed. Warrior Met's severe and pervasive unfair labor practices and their long-lasting effect on the entire bargaining unit make a "meaningful choice to decertify the Union impossible." *Wendt Corporation*, 371 NLRB No. 159, at fn. 36.

B. Voter Eligibility - All Employees on Warrior Met's Seniority List Immediately Prior to the Union's Unfair Labor Practice Strike Are Eligible to Vote in an Election Concerning the Decertification Petition

If the Regional Director directs an election in this matter, despite Warrior Met's numerous severe, pervasive and unremedied unfair labor practices and the causal connection demonstrated between that conduct and subsequent employee disaffection to the Union, all bargaining unit members on the Employer's seniority list immediately prior to the Union's unfair labor practice strike should be allowed to cast a ballot and exercise their right to decide whether to retain the Union as their collective bargaining representative. Other than self-serving testimony concerning a unilaterally imposed and arbitrary deadline to schedule certain return-to-work testing, Warrior Met did not present any credible evidence (or any evidence at all) to establish that any of the approximately 920 bargaining unit members appearing on the seniority list maintained by the Employer immediately prior to the Union's unfair labor practice strike should be deemed ineligible to vote in an election.

In response to the decertification petition and as part of its position statement, Warrior Met produced two lists that contained some of the names of individuals working in bargaining unit position immediately prior to the unfair labor practice strike. *See* Board Exhibit 1(k)(Box 3 List and Box 3(b) List). Warrior Met, however, only included two groups of individuals: 1) employees who (as of 4/2/23 - the pay period ending immediately prior to the filing of the decertification petition) had returned to work (either by crossing the Union's picket line or in response to the Union's unconditional offer to return to work) or 2) employees who after the pay period ending 4/2/23 (and as of the date of the list prepared by Warrior Met) had returned to work or who were still in process of being brought back to work after completing the return-to-work protocols required by Warrior Met. As the Union noted at the hearing, these lists and the unilateral

parameters created by Warrior Met when it created them left off a large portion of the bargaining unit members employed by Warrior Met immediately prior to the Union's unfair labor practice strike. *See* Transcript at 741-747.[11]

At the conclusion of the hearing, the Union offered into evidence the seniority list maintained by Warrior Met immediately prior to the unfair labor practice strike. *See* Transcript, at 944, Union Exhibit 14 (Union membership and seniority list received sent to the Union by Warrior Met on 3/24/21).[12] A comparison of the seniority list maintained by Warrior Met immediately prior to the unfair labor practice strike and the lists prepared by Warrior Met for the hearing establish a significant disparity in the number of individuals who Warrior Met claims should be eligible to vote. In fact, the seniority list at the time of the unfair labor practice strike contains approximately 150 more bargaining unit members than the list created by Warrior Met at the time of the hearing.

This significant discrepancy is based upon Warrior Met's unilateral and arbitrary decision to "weed off" its "eligibility" lists all employees who had not completed an employer required return to work drug test by March 16, 2023. *See* Transcript, at 625-26. At the hearing, Warrior Met acknowledged that after its self-imposed deadline, it made no further attempt to contact these

[11] During the hearing Petitioner and Warrior Met argued that the Union had waived its ability to argue over the question of which of Warrior Met's bargaining unit members should be eligible to participate in an election. *See* Transcript at 744-45. The Hearing Officer rejected this argument, noting that the Union was not required to provide an eligibility list at the time it submitted its position statement (due at the same time as Warrior Met's statement which contained the deficient lists). *Id*. at 745. He further ruled that the parties could make arguments in their briefs over this issue. *Id*.

[12] Along with this seniority list, the Union also offered into evidence Union Exhibit 12 (the 3/23/21 information request the Union sent to Warrior Met requesting the seniority list) and Union Exhibit 13 (an email dated 3/24/23 from Warrior Met to the Union in response to the Union's information request which attached the seniority list). Both exhibits, as well as the Union member and seniority list provided by Warrior Met to the Union were accepted into evidence.

employees. Instead, it merely sent the employees a letter (by regular mail), with no ability to confirm receipt, informing them that Warrior Met considered them to have abandoned their employment. *See* Transcript, at 628, 658-660.[13]

The Union did not agree to the arbitrary deadline imposed by Warrior Met concerning its return-to-work drug test, or the Employer's position that its members had abandoned their employment with Warrior Met if they did not take the Employer's required drug test by a certain date. *See* Transcript, at 132. As Mr. Sanson testified, the Union had made an unconditional offer to return to work, thus it was careful not to set any subsequent conditions on this offer that will alter its nature. *Id*. In fact, Mr. Sanson testified that he recalled one instance where he asked a question to Warrior Met about the terms and conditions the Union members would work under upon their return and he was met with a response by Warrior Met questioning whether the Union was attempting to set conditions for the return to work of its members. *Id*.

Despite the above, Warrior Met will likely suggest that there was an agreement between the Employer and the Union concerning return-to-work protocols. But, the only witness Warrior Met presented on this issue, Shelly Sterling (a Warrior Met human resources representative), admitted that she was not aware of any written agreement between the parties on this issue and no one had told her there was a written agreement. *See* Transcript, at 652. In addition, Ms. Sterling also admitted she was not present at a meeting during which she claims there was such an agreement. *See* Transcript, at 652, 658-59. In fact, Ms. Sterling also admitted that she only knew of a purported agreement between the Union and Warrior Met because her boss – Kelli Gant – told

[13] Warrior Met did not include as part of the record evidence a copy of the form letter it sent to employees who it claimed had abandoned their employment. A copy of this form letter is attached hereto as Exhibit A.

her. Ms. Gant, Warrior Met's chief administrative officer and leader of its bargaining team, did not testify at the hearing.[14]

As previously stated, Mr. Sanson, who provided extensive testimony at the hearing, denied that there was an agreement between the parties concerning the protocols Warrior Met intended to use to bring bargaining unit members back to work. See Transcript, at 132, 265. Mr. Blankenship corroborated this testimony, confirming there was no such agreement. *See* Transcript, at 738. Indeed, the testimony provided by both Mr. Sanson and Mr. Blankenship concerning the problems and frustration Union members experienced over Warrior Met's prolonged return-to-work process and what the members viewed as a deliberate "slow roll" of that process belies any finding that the parties had agreed to how the return to work would be accomplished. *See* Transcript, at 736-38 (Blankenship Testimony); see also Transcript, at 75-78. [15]

Given the above, the Union suggests that employee eligibility to vote in an election should be drawn from the seniority list maintained by Warrior Met at the time of the unfair labor practice strike, rather than a subsequent list Warrior Met created that purged a substantial of individuals who appear on the earlier employer-maintained list. If, upon casting a ballot, there is a question concerning an individual's eligibility, including their continued employment with Warrior Met,

[14]Because Warrior Met failed to call the head of its bargaining team and chief administrative officer to testify as to whether she reached an agreement with the Union (through Mr. Sanson) concerning the return-to-work protocols an adverse inferenced should be drawn that this witness, if called, would have testified otherwise. *Carpenters Local 405*, 328 NLRB 788, 788 fn. 2 (1999)("The Board has long held that "the failure of a witness to appear on behalf of a party for whom he/she would be expected to give favorable testimony may appropriately give rise to an inference that the witness's testimony would be unfavorable.").

[15] The fact that the Union shared some of its member lists with Warrior Met to hasten the return to work for its members is hardly evidence of an overall agreement as to how the Employer was to conduct the Union's unconditional offer to return its members to work. Any suggestion by Warrior Met to the contrary must be rejected.

that ballot can be challenged in the customary manner and a determination can be made at that time as to whether to count the ballot.

C. If the Region Directs an Election in Response to the Decertification Petition, It Should Allow for In-Person and Mail-In Balloting Depending on Whether an Employee has Returned to Work.

If the Region determines to disregard the well-established and settled law set forth most recently in *Rieth-Riley* and *Wendt Corporation* discussed above, and, despite the severe and pervasive evidence of Warrior Met's unlawful conduct that evidences a premediated and calculated plan to rid itself of the Union by creating frustration, discontent and anger amongst the bargaining unit that members would direct towards the Union, orders the parties to proceed with an election, such an election should be conducted in a hybrid manner. Towards that end, employees who have either returned to work, or who are still in the process of returning to work, should be allowed to vote in-person, at a location to be determined by the Region. A mail-in ballot should be sent to those employees who have not yet commenced the return-to-work process, but who have not demonstrated that they have abandoned their employment with Warrior Met – either through retirement, death or some other affirmative indication (subject to independent confirmation) that they should be removed from the seniority list maintained by Warrior Met immediately prior to the Union's unfair labor practice strike. *See* Union Exhibit 14 (Union membership and seniority list received sent to the Union by Warrior Met on 3/24/21).[16] This arrangement is the only way to ensure that all individuals on the pre-strike seniority list (Union Exhibit 14) are given an opportunity to exercise their statutory right to cast a ballot in deciding whether to retain their chosen bargaining representative.

[16] Interim employment during the Union's unfair labor practice strike should not operate to render ineligible an individual who was employed in a bargaining unit position immediately prior to the unfair labor practice strike.

If either party believes that there are questions concerning an individual's eligibility to vote - either by casting an in-person ballot or submitting a mail-in ballot, a challenge can be made at the time the ballots are counted. As explained above, significant questions remain over the fairness and reasonableness of Warrior Met's attempt to "weed out" otherwise eligible employees by suggesting that they abandoned their jobs when they failed to comply with the Employer's unilaterally imposed return-to-work drug testing deadline and then did not respond to a letter Warrior Met claims it mailed to these employees by regular mail, thus providing no means to confirm that the letters were actually received by the individuals whom the Employer now seeks exclude from the election. The hybrid option proposed by the Union allows the Region to resolve any remaining eligibility issues, rather than leaving those issues to be determined by Warrior Met's unilateral actions, thereby risking a significant and improper diminution of the number of employees eligible to participate in an election.

The Union further submits that an election date should be set for no earlier than 20 business days after a notice of election is issued. Mail ballots should be sent out on the same date as the in-person election. The ballots should be counted no earlier than 28 days after the date of the in-person election, to allow for adequate time for the United States Postal Service to complete delivery of the ballots, while also allowing employees reasonable time to cast their ballot and mail it back so that it arrives in time to be include in the ballot count.

Finally, the Union submits that the in-person election should occur based on applicable Board precedent and under direction of the Region to allow for a fair and reasonable opportunity for employees to exercise their right to cast a ballot free from intimidation and/or coercion at a time and place that is also reasonable based on the Warrior Met's various mine locations the employee work shifts.

Respectfully submitted,

Mark J. Murphy

Mark J. Murphy
Mooney, Green, Saindon, Murphy
& Welch, P.C.
1920 L Street, N.W.
Suite 400
Washington, D.C. 20036

Richard P. Rouco
George Davies
Quinn, Connor, Weaver, Davies
& Rouco LLP
Two North 20th Street
Suite 930
Birmingham, AL 35203

Kevin Fagan
United Mine Workers of America
18354 Quantico Gateway Drive
Suite 200
Triangle, VA 22172

June 5, 2023

WARRIOR

March 16, 2023

Ricky L. Aaron
P.O. Box 144
Parrish, Alabama 35580

Re: Return to Work Status

Dear Ricky Aaron,

As you are aware, the United Mine Workers of America has advised Warrior of the unconditional offer to return to work of striking employees and the first step required in the return to work process was a re-employment drug screening. The time period to complete this testing was March 2, 2023 through March 16, 2023.

Our records indicate that you did not show up for this testing during this timeframe. Due to your failure to appear for testing, the Company concludes that you have elected not to return to work and will consider this your voluntary resignation.

If you feel you are receiving this letter in error, you must notify us in writing at the email address below within five days of your receipt of this letter. All correspondence should be directed to humanresources@warriormetcoal.com.

Sincerely,

Human Resources
Warrior Met Coal Mining, LLC

CC: Brian Sanson - UMWA International Secretary-Treasurer

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10

Tony Morgan,	)	
	)	
Petitioner,	)	
	)	
and	)	**Case: 10-RD-315651**
	)	
International Union, United Mine Workers of America,	)	
	)	
Union,	)	
and	)	
	)	
Warrior Met Coal Mining Company, LLC,	)	
	)	
Employer.	)	

POST-HEARING BRIEF OF
PETITIONER TONY MORGAN

I. INTRODUCTION

This is a decertification petition filed by Petitioner Tony Morgan ("Morgan") seeking to decertify the United Mine Workers of America (the "Union") as the exclusive bargaining representative for himself and other employees of Warrior Met Coal Mining Company, LLC ("Warrior Met") at its mines in Brookwood, Alabama.

A hearing was conducted before Hearing Officer Joseph Webb on May 4-5, 8-9, and 11, 2023.[1] The case is now before the Regional Director for a decision and direction of election.

[1] References to the hearing transcript will be indicated by "T-" followed by the page number or numbers on which the supporting evidence may be found. References to Board, Union and Employer Exhibits admitted into evidence at the hearing will be indicated by "B-", "U-", and/or "E-", respectively, followed by the number of the exhibit.

II. FACTS

A. Background

Warrior Met operates several coal mines in Tuscaloosa County, Alabama. Its miners have long been represented by the Union as the certified exclusive collective bargaining agent. As the end of the 2016 Collective Bargaining Agreement between Warrior Met and the Union approached they started holding bargaining sessions for the negotiation of a successor agreement in February 2021.

Following several bargaining sessions the Union issued a 16-page, 300 item, information request to Warrior Met on March 19, 2021. (T. 105-06) After just eight business days from this extraordinary information request the Union filed an unfair labor practice charge on March 30, 2021, against Warrior Met alleging it had failed to provide the requested information and thus had engaged in unlawful bad faith bargaining. (T. 150) The Union then went on strike the very next day on April 1, 2021.[2]

B. The Tentative Agreement and Ratification Vote

The Union and Warrior Met reached a tentative agreement as to all items on or about April 5, 2021, which included a bargained for concession by Warrior Met to reduce the percentage cap on the usage of contract labor from 25% to 20%. (T. 156, 776-77) The Union was able to secure this concession and otherwise reach a complete tentative agreement as to all issues ("TA") and take the TA to a ratification vote without having all of the information it had requested on March 19, 2021.

[2] Although Petitioner is not fully apprised of the circumstances surrounding the strike, there appears to be some dispute between Warrior Met and the Union as to whether the strike was economic in nature based on the ongoing bargaining or an unfair labor practice strike in response to the alleged refusal to provide information.

The Union then held an "explanation meeting" for its members at which the Union recommended that the TA be rejected despite the earlier "ground rule" agreement with Warrior Met that any TA as to all issues must be conditioned upon the unanimous recommendation of the Union's bargaining committee for ratification. (T. 326-27, 388, 415). Predictably, given the Union's recommendation, the TA was not ratified by a vote of approximately 95% against and 5% for ratification. (T. 157). Accordingly, the then week long strike continued, and the Union warned members to be ready for "a long summer." (T. 388).

C. The Violent Strike

The ensuing strike was marred with violence, threats of violence, property damage, and misconduct unseen in the State of Alabama for decades. Employees' cars were beaten. Employees who chose to exercise their Section 7 rights to not support the Union's strike were called names including "motherfucker," "Scab," "bitch whore," and worse. (T. 289-90, 295-97, 320-21, 359, 384-85, 492, 499, 533). Homemade road spikes called "jackrocks" were placed in the roadways to and from the mines intended to flatten the tires of anyone who dared to simply go to work, and an innumerable number of tires, personal property of both Warrior Met employees and members of the general public, were flattened just as the Union intended. (*See id.*) Because of these violent and harassing actions Warrior Met employees, on multiple occasions, had to be shuttled into work on school buses reinforced with metal bars on the windows to protect against projectiles from the strikers. (T. 429-31, 451, 499-500).

Warrior Met filed a lawsuit in Tuscaloosa County Circuit Court obtaining an injunction against the Union and also filed multiple unfair labor practice charges against the Union related to the strike violence and misconduct. The ULPs against the Union resulted in an admission by the Union of commission of misconduct and an initial award in August 2022 by this Region of

$13,300,000 in damages against the Union and in favor or Warrior Met which was ultimately reduced to 435,000. This was well known among the active employees and strikers at Warrior Met.

Some employees never went on strike and always worked. Others went on strike for a while but returned to work out of disgust over the Union's behavior. Then, on February 16, 2023, after almost two years of being on strike, the Union communicated an unconditional offer to return to work but acknowledged to Warrior Met "the logistical issues that returning several hundred striking employees to work poses."[3]

D. The Return to Work Agreement

Following the end of the strike the Union and Warrior Met began discussing the return to work process for strikers who intended to come back. Given that almost two years had passed many strikers had moved on with other jobs, retired, or even died. So over the ensuing weeks the Union and Warrior Met negotiated over and ultimately agreed to a return to work process that required the satisfactory completion of a drug test, physical fitness evaluation, and mine safety training. (C1, C2).

III. ARGUMENT

A. The Union Has Failed to Demonstrate Employee Disaffection Has Been Caused by Anything Other Than Its Own Egregious Misconduct.

An analysis of the four *Master Slack* factors demonstrates the Union has failed to carry its burden to demonstrate that the employer's unfair labor practices caused the employee disaffection with the Union leading to the decertification petition. "Not every employer unfair labor practice will taint evidence of a union's subsequent loss of majority support." *Champion Enterprises, Inc.*, 350 NLRB 788, 791 (2007). More specifically, "where the unfair labor practices do not involve a general refusal to recognize and bargain with the union, **there must be specific proof of a causal**

[3] E. 1 (Letter from C. Roberts to W. Scheller, III, Feb. 16, 2023).

relationship between the unfair labor practices and the ensuing events indicating a loss of support." *Id.* (emphasis added); *see Lexus of Concord, Inc.*, 343 NLRB 851, 852-53 (2004) (reasoning evidence that employee disaffection occurred prior to unfair labor practices is relevant to a *Master Slack* inquiry and supports a finding in favor of proceeding to an election on the petition).

To determine whether an unfair labor practice is causally connected to disaffection with the Union, the Board looks to the *Master Slack* factors, which are: (1) the length of time between the unfair labor practices and the withdrawal of recognition; (2) the nature of the violations, including the possibility of a detrimental or lasting effect on employees; (3) the tendency of the violation to cause employee disaffection; and (4) the effect of the unlawful conduct on employees' morale, organizational activities, and membership in the union. *Champion Enterprises, Inc.*, 350 NLRB 788, 791 (2007) (citing *Master Slack Corp.*, 271 NLRB 78, 84 (1984).[4] Furthermore, the Board looks at **all the circumstances** to determine whether the company's alleged unfair labor practices was the cause of union disaffection. *Lexus of Concord, Inc.*, 343 NLRB 851, 852-53 (2004); *see also In re Bunting Bearings Corp.*, 349 NLRB 1070, 1072 (2007) (dismissing the petition where the employer locked out employees merely eight days before employees circulated the decertification petition and there was no evidence of employee disaffection prior to the lockout).

One of the circumstances the Region must consider is striker misconduct. *JC Produce, Inc.*, No. Case 21-CA-36348, 2005 WL 1313522, at *4 (May 9, 2005). In *JC Produce*, "a number of

[4] While the first three factors are viewed through an objective lens of whether the unfair labor practice would undermine union support, the fourth factor is more targeted to the actual effect of the unlawful conduct on the employees. *See Overnite Transportation Co.*, 333 NLRB 1392, 1397 n.22 (2001); *see also Dist. Hosp. Partners, L.P.*, 370 NLRB No. 118 (Apr. 30, 2021) (considering the "**representative sample of employee sentiment produced**" in the analysis of the final *Master Slack* factor).

petition signers stated that their disaffection with the Union pre-dated the strike or was caused by the Union's conduct during the labor dispute, including strikers' misconduct." *Id.* Furthermore, the record evidence demonstrated the company had a good-faith (even if mistaken) basis for terminating some strikers based on misconduct. *Id.* The Office of General Counsel, thus, advised (1) those terminations would be considered technical violations that would not support a causal nexus under the second or third *Master Slack* factors and (2) the record clearly demonstrated that employee's disaffection was not caused by the terminations, so the fourth *Master Slack* factor also weighed in favor of withdrawing recognition of the union. *Id.*

The Board's decision in *Garden Ridge Mgmt., Inc.*, 347 NLRB 131 (2006) is also instructive to this case. In *Garden Ridge*, the Board reversed the administrative law judge's conclusion for each *Master Slack* factor. *Id.* at 134. The Board held (1) a five-month period between the employer refusing to hold an additional bargaining session and the employee's circulation of the decertification petition weighed against a causal connection; (2) in light of the ongoing negotiations for a year-long period, there was no evidence that the employer's unfair labor practice was the type of violation that would cause disaffection or that it had a tendency to cause disaffection; and (3) there was no evidence in the record that the scheduling dispute had a negative effect on employee morale, organizational activity or membership in the Union. *Id.* Accordingly, the Board held that the employer's withdrawal of recognition from the union was lawful. *Id.*

Finally, even a multitude of unfair labor practices is not sufficient to dismiss a decertification petition when there is not an adequate causal connection between the employer's practices and the employee disaffection. In *Champion Enterprises*, the company refused to provide to the union information requested in the Union's February 11, 2002, request and was found to have unilaterally laid off bargaining unit employees, in addition to two other miscellaneous,

independent unfair labor practices. 350 NLRB No. 62, 792. The Board held that all five of the unfair labor practices were insufficient to cause employee disaffection with the union. *Id.* The Board reasoned that all the unfair labor practices, except the refusal to provide requested information, were too remote to have a causal connection because they occurred five to six months before the circulation of the decertification petition. *Id.* at 791-92. And, even though the refusal to provide requested information occurred within two months of the petition circulation, there was no evidence in the record that unit employees had knowledge of the violation at the time of signing the petition. *Id.* at 792. The Board, therefore, reversed the ALJ and held each of the *Master Slack* factors weighed in favor of the withdrawal of recognition. *Id*.

Here, in its Pre-Hearing Brief, the Union focused on whether Warrior Met's delay in providing answers and documents to a nearly 300-item information request had a sufficient causal connection to the general disaffection with the Union prompting Morgan and Barnhill to circulate a petition to decertify the Union. The Union also tangentially raised the issue of whether Warrior Met terminating the employment of 41 individuals (who the company had a good-faith basis for believing participated in egregious misconduct) could taint the decertification petition. Then, during the course of the four-day hearing, the Union contended that several, miscellaneous unfair labor practices (filed after the hearing opened) also could have tainted the decertification petition. However, the record evidence does not support the Union's contentions, particularly in light of the Board's requirement that there be **specific proof of a causal relationship** between Warrior Met's unfair conduct and the employee's disaffection with the Union.

1. A substantial amount of time passed between the alleged unfair labor practices and the decertification petition.

The Union filed its unfair labor practice charge in Case No. 10-CA-274900 alleging Warrior Met refused to comply with its March 19, 2021, information request on March 30, 2021,

and went on strike the next day. Regarding the 41 violent strikers that were not allowed back to work, that list was circulated on August 29, 2022. (T. 48-51). This petition was filed on April 6, 2023 – over two years after the paper violation and eight months from any technical violation that may arise from the discharge of the 41 employees for strike misconduct. Even taking the closest event (that is, the termination of the 41 employees), this passage of time is much larger than the eight-day timeframe found in *Bunting Bearings* and much more akin to the findings in *Champion Enterprise* and *Garden Ridge*—that is, even a period of five to six months is "too remote in time to have caused the employees' disaffection with the Union." *Champion Enterprises*, 350 NLRB No. 62, at *791-92. Thus, the eight month, and surely the two year, time difference destroys whatever causal nexus may have existed between these alleged, but unproven, unfair labor practices and any employee disaffection for the Union has motivated workers to sign the decertification petition.

Even if the passage of two years for a paper violation was not enough to break a causal nexus, the fact that none of the representative sample of employees at the hearing had knowledge of the pending unfair labor practice charge (or the underlying facts) destroys any causal relationship between the practices and employee disaffection. *See Champion Enterprises*, 350 NLRB No. 62, at *792.[5]

2. Nature of the Alleged Violations.

The nature of the alleged violation in Case 274900, the principal ULP upon which the Union's argument turns, is quite literally a paperwork violation. The Union claims Warrior Met did not timely or completely respond to its information request submitted a mere 11 days before

[5] This same rationale applies to the minor, miscellaneous violations the Union did not raise until after the opening of the hearing. The representative sample of employees overwhelmingly testified to not having knowledge of the miscellaneous ULPs, and the underlying conduct did not affect the motivations for circulating or signing the petition. (T. 300-04, 364-66, 401-05,505-07, 538-41, 596).

the Union filed its ULP. While such a violation is characterized as a Section 8(a)(5) refusal to bargain, actual bargaining had been ongoing for approximately two months before the Union even submitted the information request at the basis of Case 274900 and bargaining continued for two years after and is ongoing today. In fact there have been in excess of 40 bargaining sessions (T. 26), and at least one ratification vote.

During the hearing Union witnesses pointed to needing information about the use of contract labor (which was permitted by the terms of the predecessor 2016 collective bargaining agreement that the Union had negotiated and ratified). Union witnesses acknowledged that the use of contract labor as agreed to by the Union in the 2016 agreement was an issue for its members, but yet it did not issue an information request seeking information about that until two months after bargaining began. Even then the Union succeeded in extracting a concession from Warrior Met lowering the percentage cap on the use of contract labor which was part of the TA that was submitted for a ratification vote in April 2021 shortly after the strike began. Obviously the contract labor information was not material enough to prohibit the Union's bargaining representatives from reaching an overall TA to submit for ratification. It simply cannot be concluded that the Union's scheme of manufacturing an information request ULP to cover its strike as a ULP strike as opposed to an economic one has any causal connection with employee disaffection.

The Union then points to the multiple ULPs it filed challenging the termination of 41 strikers by Warrior Met for engaging in strike misconduct. However, there is no evidence of any employee disaffection with the Union over this. Many witnesses testified they were pleased those employees were not going to be able to return. (T. 376, 391, 418, 579). Union witnesses testified that they had heard from others that they would not return to work unless they <u>all</u> returned to work – including the 41 discharged strikers. (T. 771, 885-86). However, that stance is not indicative of

employee disaffection with the Union. Instead, it illustrates how some strikers stand in such solidarity with the Union that they will not go back to work unless all Union members are able to return regardless of what misconduct they engaged in during the strike.

Again, the Board's decisions in *Champion Enterprises* and *Garden Ridge* are instructive. In *Garden Ridge*, the Board held the nature of the violation, which was a refusal to meet to bargain at a sufficient time, weighed against a finding of taint in the withdrawal. The paperwork violation in this case is analogous: Warrior Met negotiated with the Union four two years, but the Union believed the timing of responses to information requests were delayed (or amounted to a failure to respond). The nature of such paperwork violation in light of ongoing bargaining negotiations weighs against a finding of a taint in the decertification petition. Moreover, *Champion Enterprises* specifically demonstrates that a refusal to respond to information request, even when combined with other alleged wrongful practices, does not amount to sufficient proof of a causal nexus for the second *Master Slack* factor.

The termination of the 41 violent strikers (if even a violation) is also not of a nature as to create a taint on the decertification petition. In *JC Produce*, the employer did not allow multiple strikers to return to work because it had a good faith basis (even if it was a mistaken basis) for believing strikers engaged in blocking a truck's ingress, aiming flashlights at truck drivers, placing picket signs over the mirrors of trucks, hitting a driver with a picket sign, and breaking off a truck's antenna. No. Case 21-CA-36348, 2005 WL 1313522, at *1 (May 9, 2005). Similar to *JC Produce*, Warrior Met had a good faith basis for believing the 41 individuals not allowed to return to work engaged in egregious misconduct on strike. Thus, the Region should hold just as the Office of General Counsel advised in *JC Produce* – that is, "the[] terminations are not of the kind that would support a causal nexus under the second and third factors of the *Master Slack* test."

3. Tendency of The Violation to Cause Employee Disaffection.

It is quite unlikely that the timeliness or completeness of Warrior Met's response to an information request submitted to Warrior Met six weeks after bargaining began and eight business days prior to the strike would weigh so heavily on the mind of employees resulting in such widespread disaffection with the Union that a petition supported by an overwhelming majority of employees' signatures is the product. This speculative proposition is the primary thrust of the Union's attempt to dismiss the petition, and, following four days of testimony and exhibits at the hearing the Union desperately sought to avoid, remains devoid of substance or factual support.

This contrasts with the conduct at issue in *Rieth-Riley* where the employer was accused of an unlawful lockout designed to force agreement on permissive, not mandatory, subjects of bargaining. The work stoppage in *Rieth-Riley* was employer initiated. Here, the Union decided to go on strike, recommend the rejection of a TA at an April 2021 ratification vote, and then try to extract more favorable terms by remaining on strike for the next 22 months. That decision was a gamble which the Union lost. In contrast, in *Overnite Transportation Co.*, 333 N.L.R.B. 1392 (2001), the employer stood accused of multiple, egregious, nationwide hallmark violations of the Act, none of which were an alleged incomplete or untimely response to an information request.

The accusation of a failure to provide complete or timely responses to an information request is not the type of unfair labor practice charge that underlies the requisite finding of a causal nexus between the violation and employee disaffection with the Union, especially when the record demonstrates that the representative sample of employees at the hearing were unaware of the alleged refusal to provide timely information. *See Champion Enterprises, Inc.*, 350 NLRB at 792.

4. Effect of Unlawful Conduct on Morale, Organizational Activities, and Union Membership.

On this factor the Union has nothing to offer but mere rhetoric. There is no evidence that the unlawful conduct had undermined Union membership. In fact, Union witnesses testified that either there has been no negative impact on Union membership or that the Union has actually strengthened – building support in recent months around the time of the filing of the instant petition. (T. 771, 885-86).

The Union attempts to argue that Warrior Met's alleged refusal to provide timely or complete responses to the Union's information request has impaired the Union's ability to fulfill its bargaining obligations. But this contention is belied by the evidence that the Union extracted a concession on an important bargaining issue (lowering the cap on the permitted usage of contract labor) and reaching a TA as to all issues to submit to ratification vote within weeks of the submission of the information request. The fact that the TA was overwhelming rejected is a product of the Union's own recommendation to reject the contract not evidence of a failure the Union's ability to fulfill its bargaining obligations.

Additionally, the undisputed testimony was clear that the employees either had no knowledge of the alleged ULPs or, for the ones they had heard of, they had no impact on their disaffection with the Union. (T. 293-94, 299, 363, 444; 489-90, 529, 535-37, 577, 595). Most of the testimony was that the employees had not never heard of the ULPs and did not even know what a ULP was nor had they even heard that the Union had accused Warrior Met of not timely or completely responding to any information request. With respect to the alleged ULPs regarding the 41 discharged strikers there were two types of testimony. The Union witnesses testified that it strengthened the resolve of its supporters such that some strikers were refusing to return to work following the end of the strike out of solidarity with the 41 discharged employees. (T. 771, 885-

86). Petitioner's witnesses testified they were pleased these employees were not being permitted to return. (T. 294, 376, 380, 391-92, 418, 537-38, 578-80). Further, the representative sample of employees testified that they were disaffected with the Union long before the 41 strikers were discharged for picket line misconduct. Instead, it was the Union's actions that caused their disaffection. (T. 295, 299, 306, 317, 324, 383-87, 395, 447-450, 453-56, 492-95, 498-503, 530-33, 569-71).[6] What is absent is any testimony or evidence that the discharge of these 41 strikers for misconduct caused any employee, not even one, to become disaffected with the Union such that they wanted to decertify the Union. This absence of specific proof of a causal link between the alleged unlawful labor practice and employee disaffection means this petition should not be dismissed and instead scheduled for a vote as soon as possible.

***

Ultimately, the Region must view all the circumstances to determine if the Union has shown specific proof of a causal relationship between Warrior Met's alleged misconduct and employee's singing Petitioner Morgan's decertification petition. The Union cannot show sufficient, specific proof because there is none. Simply put, some employees (like Morgan and Dotson) have never wanted the Union at Warrior Met in the first place, other employees (like Harmon) have felt disaffected because of the foul and violent actions of strikers (which they believe the Union has at least acquiesced in)[7] or the manner in which Union members treated

[6] The misconduct causing disaffection included name calling, throwing jackrocks, blocking the exit of the mines other property damage to vehicles, destruction of personal property, and threatening physical harm to workers. Other actions that caused disaffection was the Union's treatment of contractors, especially the Union-supported bullying of individuals in the bathhouses. (T. 349-50, 446, 461-62, 571-77). Several people also referenced that the Union's lack of communication with its own members caused disaffection. (T. 325-26, 335, 362, 427, 429, 510-11, 527-28, 589). The Union's lack of communication is separate and apart from the Union's allegations that the company refused to provide responses to information requests; rather, the Union simply was poor at informing its members on the status of bargaining. (*See generally id.*)

[7] (*See* T. 383-87, 396).

contract workers, and still others are as invigorated in the Union as ever.[8] Thus, the proper procedure is to allow each employee to exercise their Section 7 right by participating in an election to determine the future of the Union at Warrior Met, rather than silencing the voices of the employees.

IV. METHOD AND MANNER OF CONDUCT OF ELECTION

Petitioner petitioned for an election among the following employees: *All full-time hourly employees employed at the Employer's Alabama mine numbers 4, 5, and 7, including all full-time hourly employees working at the preparation plants and services facilities at mine numbers 4, 5, and 7 and all full-time hourly central shop and warehouse employees.*[9]

Petitioner contends the election should be conducted manually on one of the following dates: July 18, 19, 20, 25, 26, or 27, 2023. The payroll eligibility cutoff date would be the payroll period ending date immediately prior to the date of the election as identified by the employer.[10] Petitioner contends the election could be completed on one day with two polling periods: one from 4:00 a.m. to 8:00 a.m. and the second polling period from 4:00 p.m. to 8:00 p.m. This schedule would permit all employees on Warrior Met's two-shift operation ample opportunity to vote.

Having the election after July 15, 2023, would permit the return to work onboarding process for former strikers who intend to return to work to be completed consisting of drug testing, completion of the physical, and mine safety training. (T. 627-28) Moreover, by that time five months will have passed since the end of the strike and the Union's offer to return to work and thus it will be apparent that anyone who has returned to work by that time constitutes an active

[8] (*See* T. 771, 885-86).

[9] The parties stipulated to this unit description during the hearing. (T. P. 18).

[10] Based on the testimony of Warrior Met's Human Resource Manager Sherry Sterling regarding Warrior Met's biweekly payroll cycle Petitioner believes the relevant payroll eligibility cutoff date would either be July 9 or 23 depending on the date scheduled for the election. (T. 618:21-25).

eligible employee.[11] Those who have not completed the return to work protocol would not be active, eligible employees for whatever reason – moved away, accepted substitute work, or have died in the intervening two years since the strike began. Conducting the election on a Tuesday, Wednesday, or Thursday also avoids the more frequent Monday and Friday absences that tend to occur during summer months when employees tend to be on vacation and thus absent from work. With respect to the 41 discharged strikers at issue in the unfair labor practice charges filed by the Union, those persons could be permitted to vote subject to challenge as has been suggested by the Region. (T. 668:3-5).

Proceeding in this manner dispenses with any need for an eligibility formula but instead facilitates the usage of a simpler eligibility determination of whether a person is employed on the eligibility date and on the date of the election. It should also help avoid or minimize disputes and challenged ballots over voter eligibility. The strike that concluded in February 2023 would have no bearing on eligibility as it will have been over for five months and all former strikers would have had ample opportunity to demonstrate their intention, or lack thereof, to continue employment at Warrior Met by completing the tripartite return to work process or not. While Petitioner desires to have an election as soon as possible, he is willing to delay a vote into mid to late July to permit the return to work process to run its course and avoid any complex eligibility issues that may otherwise arise by holding a vote prior to that process being completed.

Petitioner defers to the employer as to the proper locations for the conduct of the election but states that he believes the safety/training building at mine 4, the safety/training building at

[11] As of the time of the hearing the last physical for one returning employee was to be completed on May 9, 2023, and there were two employees on military assignments who were to return in June and July, but all other returning employees had already been scheduled for a physical. (T. 633:23-634). It was expected that this entire process would be completed by the end of May with the exception of the two employees on military assignment whose return to work process would be completed in July. (T. 676:6-677:2)

mine 7, and the training center at 5 mine prep, central shop, and central supply are adequate polling locations.

V. CONCLUSION

The Board should not become party to the Union's efforts to obstruct and interfere with the Petitioner and his co-workers' Section 7 rights to refrain from supporting labor organizations by dismissing this decertification petition. These workers have been subjected to nearly two years of egregious harassment, name-calling, violence, threats of violence, and destruction of personal property. They have had enough and are entitled to at least a vote as to whether they want the Union to continue to be their certified, exclusive bargaining representative. While Warrior Met has been paid $435,000 in damages by the Union for picket line misconduct as ordered by this Board, the employees have received no justice for what they have endured. Conducting a Board-supervised free and fair election is the best and most accessible way for them to hold the Union accountable for its actions and the actions of its leadership and members and to determine whether they want the Union to continue to have power and influence in their workplace.

Petitioner and his co-workers demand and deserve a vote to decide if the Union gets to maintain its representative status and continue to have the ability to extract dues from these employees. Based on the relevant factors, the Board should disregard the Union's efforts to evade accountability for its actions by misdirecting blame at Warrior Met for the widespread and palpable employee disaffection with the Union and instead schedule a manual election to determine whether the bargaining unit employees still wish to be represented by the Union.

Respectfully submitted,

Thomas W. Scroggins
Burr & Forman, LLP
420 North Twentieth Street
Suite 3400
Birmingham, AL 35203
Telephone: (205) 458-5105
Facsimile: (205) 458-5100
Email: tscroggins@burr.com
COUNSEL FOR PETITIONER TONY MORGAN

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10

Tony Morgan,	)	
	)	
Petitioner,	)	
	)	
and	)	**Case: 10-RD-315651**
	)	
International Union, United Mine Workers of America,	)	
	)	
Union,	)	
and	)	
	)	
Warrior Met Coal Mining Company, LLC,	)	
	)	
Employer.	)	

CERTIFICATE OF SERVICE

I hereby certify that I have served the following counsel of record with a copy of the foregoing Post-Hearing Brief of Petitioner Tony Morgan by electronic mail this the 5th day of June, 2023:

John Mooney
Mooney, Green, Saindon, Murphy & Welch, P.C.
1920 L Street N.W.
Suite 400
Washington, D.C. 20036
jmooney@mooneygreen.com

Mark Murphy
Mooney, Green, Saindon, Murphy & Welch, P.C.
1920 L Street N.W.
Suite 400
Washington, D.C. 20036
mmurphy@mooneygreen.com

George Davies
Quinn, Connor, Weaver, Davies and Rouco, LLP
2-20th St. N.
Suite 930
Birmingham, AL 35203
gdavies@qcwdr.com

Richard Rouco
Quinn, Connor, Weaver, Davies and Rouco, LLP
2-20th St. N.
Suite 930
Birmingham, AL 35203
rrouco@qcwdr.com

David Smith
Maynard Nexsen, P.C.
1901 6th Ave. N.
Suite 1700
Birmingham, AL
dsmith@maynardnexsen.com

John Holmes
Maynard Nexsen, P.C.
1901 6th Ave. N.
Suite 1700
Birmingham, AL
jholmes@maynardnexsen.com

Matt Stiles
Maynard Nexsen, P.C.
1901 6th Ave. N.
Suite 1700
Birmingham, AL
mstiles@maynardnexsen.com

Kevin F. Fagan
General Counsel
United Mine Workers of America
18354 Quantico Gateway Drive
Suite 200
Triangle, VA 22172-1779
kfagan@umwa.org

Thomas W. Scroggins
Burr & Forman, LLP
420 North Twentieth Street
Suite 3400
Birmingham, AL 35203
Telephone: (205) 458-5105
Facsimile: (205) 458-5100
Email: tscroggins@burr.com
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Warrior Met Coal Mining Company, LLC,	)	
	)	
Employer.	)	

WARRIOR MET COAL MINING, LLC'S
POST-HEARING BRIEF TO THE REGIONAL DIRECTOR
REGION 10 NLRB

I. INTRODUCTION

Comes now Warrior Met Coal Mining LLC ("Warrior," the "Employer" or the "Company") and submits its post-hearing brief to the Regional Director of Region 10 of the National Labor Relations Board ("NLRB") in response to the Union's opposition to the RD Petition filed by Tony Morgan ("Petitioner") seeking to decertify International Union, United Mine Workers of America ("UMWA" or the "Union") as the collective bargaining representative of the bargaining unit employees (the "unit") of Warrior (the "RD Petition" or the "Petition"). The NLRB notified Warrior by letter dated April 7, 2023 that the RD Petition had been filed on April 6, 2023 and, along with other obligations of the Employer, that a Representation Hearing (the "Hearing") would be held starting May 4, 2023 and continue until its conclusion, which was Thursday May 11, 2023. The NLRB has allowed the parties to file post-hearing briefs on or before June 5, 2023.

As an initial matter, Warrior has an on-going bargaining relationship with the UMWA and recognizes its employees' rights under the National Labor Relations Act ("NLRA") to decide for themselves whether to continue being represented by the UMWA. To this end, Warrior's interests in this matter have been limited to facilitating the exchange of information necessary for the Board to do its work in response to the employees' petition, and to do this as efficiently and expeditiously as possible to minimize disruption or distraction on the job and further expense to the parties. Still, as part of this process, Warrior can hardly be expected to sit by passively allowing summary testimony about alleged unfair labor practices ("ULPs") to go unchecked by the only party with knowledge of the nature of the alleged ULPs.

The Union alleged in the hearing that the employees' disaffection for the Union has a causal nexus first with a ULP dating back to March 2021, related to unspecified "information" it has not received from the Company. The second alleged cause of disaffection is series of ULPs related to 41 employees who engaged in strike misconduct that is objectively unlawful, regardless of whether the Board thinks some of it was insufficient to support a refusal to reinstate—which it has initially indicated with regard to just three. Finally, the Union alleged its hastily filed ULP during the hearing alleging a wage increase, health insurance plan improvements, return to work protocols, the provision of meals to employees, a schedule survey, and the temporary removal of a bulletin board and grievance box while painting have all caused the bargaining unit to have such disaffection for the Union that no fair election can be held and the petition should be dismissed. These allegations are absurd as every petitioning employee testified that these things had zero effect on their own or their co-workers disaffection with the bargaining unit.

If all the evidence presented at the hearing is to be credibly believed, it seems quite clear that there are two factions of employees: one that continues to support the Union, attend its rallies and meetings, and engage with its elected and non-elected officials, and another faction that wants nothing to do with it. At least in this regard, it is a typical work environment in the 21st Century—one that is well suited to the conduct of a Board-administered election by which the majority of voters can speak with their votes.

As to the *Saint Gobain* portion of the hearing and the UMWA's burden to establish the existence of the *Master Slack* factors, it was a total failure. None of the UMWA's alleged ULPs have any temporal proximity to the decertification petition—most of what they complain about happened a year or years ago—and the nature of the alleged offenses and tendency of them to cause disaffection have no reasonable connection to the employees' actions that resulted in their filing of the decertification petition.

The Union called just one witness to meet its *Saint Gobain* burden on the *Master Slack* factors. It was Brian Sanson, a resident of Virginia, whose fly-in, fly-out treatment of the employees he represents is a nearly perfect metaphor for his distance from the underlying issues important to them. If this is the person the UMWA expects to have a sense of what has disaffected the employees, the reason for that disaffection was obvious before the first employee testified: UMWA is out of touch with its employees. After hearing the employees' testimony, it sounds like UMWA has been out of touch with its members at least since it dragged them into a strike without their consent, compounded by putting them through the apparent charade of calling them together to vote on a contract proposal and then telling them all to vote it down—which the Company now knows to have been an act of bad faith bargaining (also a ULP) after representing to the Company at the table that it would unanimously recommend employees vote

in favor of the tentative agreement. If these events in isolation did not cause the permanent and irrevocable disaffection of the bargaining unit employees, the UMWA's stonewalling, keeping employees "in the blind," and lack of communication simply exacerbated the situation. Even when the UMWA did communicate with employees, it did so with silly theatrics like barrel-burning and spreading falsehoods and other contradictions. For example, the UMWA simultaneously announced rules of good conduct for peaceful picketing while on the other hand encouraged acts of senseless violence, lawlessness, and personal injury.

Finally, the UMWA has consistently demonstrated a lack of even a basic understanding of its own CBA with Warrior, neglecting to address issues of importance to the membership in earnest, knowledgeable, or productive ways—such as by failing to address the alleged contractor issue under the grievance procedure of the 2016 CBA or by waiting until just a few days before it calls employees out for strike to issue a 16-page 250+ item information request to the Company. Even Sanson in his own testimony in this hearing acknowledged that the UMWA's lack of understanding of its own CBA might have caused disaffection of the employees it represents. There was a lot of talk about the "reasonable person" standard in the hearing, which begs the question, what reasonable person in this Union would not be disaffected by its leaders with a track record like the UMWA's?

The Company reaffirms its position statement that these employees' have earned the right—with a proper and untainted decertification petition--for their voice to be heard and their ballots counted by a Board-ordered election, as soon as possible, and stands by to facilitate the Board's election order.

II. SCOPE OF PETITION, ISSUES, WITNESSES AND EXHIBITS

The Petition says that a substantial number (more than 30%) of the employees in the unit no longer wish to be represented by the Union, that no strike is ongoing, and that Petitioner seeks "as soon as possible" an election at the "Safety/Training Building at each mine portal and the Training Center." The appropriate bargaining unit, as stipulated by the parties, is: "all full-time hourly employees employed at the Employer's Alabama mine numbers 4, 5, and 7, including all full-time hourly employees working at the preparation plants and service facilities at mine numbers 4, 5, and 7 and all full-time hourly central shop and warehouse employees. Excluded, all other employees, office and clerical employees, security guards, managers, and supervisors as defined by the Act." (Tr. 18). Warrior has fully complied with its pre-hearing obligations, including but not limited to posting and distribution of the Board's notice, submission of its position statement with employee lists, and production of information requested by the Union. Because the Union did not voluntarily agree to an election—notwithstanding the Board's exploration of potential election agreements between the parties—Hearing Officer Joseph Webb (the "Hearing Officer") presided over the *Saint Gobain* hearing for review of the *Master Slack* factors. As explained by the Hearing Officer on April 28, 2023, prior to the hearing:

> The primary focus of the hearing will be the *Saint Gobain* and *Master Slack* issues. However, we will also take evidence on who is eligible to vote, who is not eligible, and whether there should be some sort of eligibility formula used, if an election is ordered. We will also allow the parties to present their positions regarding election method, dates, time, and place, for any election that the Region may direct. [The Region] will not be taking evidence on any issues beyond these.

(Tr. 10). In the hearing, the Hearing Officer declared the five issues to be decided:

> One, whether a question regarding representation exists under the standard initially set forth by the Board in *Master Slack Corporation,* 271 NLRB 78 (1984).
>
> Two, whether employees who retain their status as strikers who have been permanently replaced are eligible to vote in the event an election is directed.

> Three, whether formerly striking employees who are in the process of returning to work but have not yet returned are eligible to vote in the event an election is directed.
>
> Four, whether replacement employees are eligible to vote in the event an election is directed.
>
> Five, we will conclude the hearing with allowing the parties to just present their positions on the appropriate methods, location, and voting times in the event an election is held.
>
> And that is the complete list of what the Region will accept evidence on at this hearing.

(Tr. 10-11, 21-22).

In the hearing, the Union offered its case-in-chief solely through the testimony of UMWA Secretary/Treasurer Sanson, and its "rebuttal" case through District 20 Representative James Blankenship, UMWA Local 2245 President Brian Kelly and Mine Committeeman Jeffrey Fleenor. The Hearing Officer received Union exhibits 1–3 and 5–11 into evidence. The Union called only two members of the Warrior units to testify. One (Fleenor) is a new Union Committeeman who has recently returned to work at No. 4 Mine. (Tr. 915). The Union's only other unit member witness (Kelly) was the Local President of Local 2245 who engaged in criminal trespass and other egregious misconduct during the strike and is therefore not eligible to return to work at Warrior. (Tr. 908).

By contrast, Petitioner presented his case through the testimony of several Warrior unit employees Tony Morgan, Joshua Barnhill, Harold Dotson, Beth Harmon, Samuel Fields, Cody Langford, Colby Oliver, and Deandre Dunn. Warrior presented its case through the testimony of No. 4 Mine Human Resources Manager Sherry Sterling and Employer exhibits 1–16 and 20 were received into evidence. The Regional Director, through the Hearing Officer, took judicial notice of the entire body of information and evidence in all NLRB ULP charges filed by the Union and

those filed by Warrior since March 30, 2021, shortly before the beginning of the UMWA's economic strike of April 1, 2021, through May 4, 2023, during the hearing. The Record also contains Board exhibits 1(a)-(r), 2 and 3 as shown in the Index and Description of Formal Documents. (B-1(r)).[1]

III. FACTS ESTABLISHED BY THE RECORD

A. Petitioner's Witnesses are Representative of Many Eligible Voters.

Petitioner Tony Morgan (Mine No. 7 East, day shift, Miner Operator, seven years at Warrior, and never a union member) ("Petitioner" or "Morgan"), solicited signatures on a petition (multiple petitions ultimately combined into one collection of signatures) during the first week of April 2023 to allow the unit members at Warrior to vote in a representation election. (Tr. 317-18). Petitioner presented the case in support of the Petition through his own testimony, along with the testimony of seven (7) other witnesses. These witnesses were:

(i) Joshua Barnhill (Mine No. 4 South, Electrician, day shift, thirteen years at Warrior, former UMWA member, went out on this strike for 5.5 months, and then return to work ("RTW") with drug screen, complete physical and annual refresher training ("ART")) ("Barnhill"),

(ii) Harold Dotson (Mine No. 4 North, at Warrior for three years, day shift, never a union member, and did not strike) ("Dotson"),

(iii) Beth Harmon (No. 7 Mine East, three years at Warrior as an inside laborer, owl shift, former union member who went out on strike for a month, walked the picket line, and crossed the picket line in May 2021) ("Harmon"),

(iv) Samuel Fields (No. 7 Mine East, four years at Warrior, Miner operator on day shift, union member for a few months at beginning, and ended his union membership before the strike in about 2020) ("Fields"),

(v) Cody Langford (Miner operator at No. 7 Mine East on day shift with three years at Warrior, never a Union member and did not go out on strike) ("Langford"),

[1] Judicial Notice is taken of extra-hearing-record UMWA strike-related legal documents and other contents in related legal cases since March 30, 2021 by the Regional Director through the Hearing Officer (*See, e.g.*, Tr. 39, 41, 47, 137-8, 400-01, 819).

(vi) Colby Oliver (Surface utility clerk at Central Supply on day shift, worked at Warrior over three years and was never a member of the Union) ("Oliver"), and

(vii) Deandre Dunn (Roof-bolter at No. 4 Mine on day shift employed with Warrior for six years and never been a Union member) ("Dunn") (collectively, "Petitioner's Witnesses").

Petitioner's Witnesses are diverse in many respects, including but not limited to prior union membership, duration of employment at Warrior, participation or nonparticipation in the strike, working at different mines represented by different locals, underground or surface work, central shop or central supply, day shift or owl shift, races, genders, and other differences.

Yet, despite these many differences, numerous relevant circumstances remained consistent among them. No supervisor or member of management ever directed them to contact counsel for the Petitioner. (Tr. 287). No supervisor or member of management influenced or assisted in the solicitation of signatures on the petition or otherwise sent other unit workers to the solicitors of signatures supporting a representation election. (Tr. 288, 313, 356, 392, 442, 490, 525, 567). No supervisors or members of management were in the vicinity of the conversations with unit members (which typically took place off Company property) about signing the petition. (Tr. 288, 357, 393, 442-43, 490, 525, 567). No unit member's signatures were solicited while either person was "on the clock" being paid by Warrior, and Company work areas were not used. (Tr. 288, 314, 357, 392, 443, 525, 566). Warrior provided no office space or other facilities to petition-signature-solicitors Morgan, Barnhill or Oliver to solicit signatures of unit members for the petition. (Tr. 289, 313-14, 393, 525-26). After making sure the particular, solicited unit member understood that this was a petition, and without trying to influence them, Morgan, Barnhill and Oliver told unit members that if they wanted to continue to be represented by UMWA, they should not sign the petition and if they did not want to be represented by UMWA, then they should sign it. (Tr. 291-92, 328-30, 393, 443). Oliver solicited and obtained signatures, but did not file his own petition because the NLRB website indicated that a Petition had already

been filed. (Tr. 544, 553). According to the testimony, a few unit people who were approached about signing the petition declined to do so. (Tr. 293, 526, 564). There is absolutely no evidence of any coercive tactics in collecting these signatures.

B. <u>Disaffection from Union has Lawful Origins.</u>

Some Warrior miners simply never wanted to have a union at all either (before or after going to work at Warrior), never needed a Union, "never believed in the Union," and needed no persuading on the subject. (Tr. 286-88, 358, 367-68, 491, 501-02, 514, 568). Warrior HR Manager Sterling—who had never met Petitioner before the RD Petition hearing and only learned of the Petition several days after it was filed—confirmed that Petitioner did not ask Warrior management for help in the petition process. (Tr. 643-45). Sterling testified that "several times" since Warrior opened operations in November 2016, she has been asked by bargaining unit members about decertifying the Union. (Tr. 645-46). She always told them to contact the NLRB and this was not something with which the Company could or would provide assistance. (Tr. 644-45).

So, long before the April 1, 2021 strike and well before any alleged ULPs by Warrior, bargaining unit employees considered decertifying the Union as their representative. (Tr. 644-45). Furthermore, during the strike of about twenty-two (22) months, more than twenty-five (25) striking unit members contacted Sterling about decertifying the Union, and more than fifty (50) unit members called her about crossing the picket line. (Tr. 647-48, 677-79). Many of these unit members said the Union had asked them to do "unethical" things like throwing jack rocks and blocking entrances to the mine, which made them become disaffected from the Union. (Tr. 678-80).

C. Warrior's Alleged ULPs Are Not the Cause of Any Disaffection.

Unlike the objections they raised with the Union's conduct, none of the unit members who signed the petition said anything about unfair labor practices by Warrior or accused against Warrior of breaking labor laws. (Tr. 293, 364, 444, 490, 528-29, 535-36). When unit members were frustrated with the Union over the "lack of information," it was about the Union not answering their questions about the status of bargaining and whether the Company had made any more CBA proposals. This frustration had nothing to do with the March 19, 2021 Request for Information or the status of the Company's responses. (Tr. 428-29, 445-46, 578, 588-89). The Union President's public statements about CBA proposals received from the Company during bargaining led many unit members to realize that the Union had received CBA proposals from the Company but not told the unit members about those offers. (Tr. 590-93, 772-76). Even Blankenship testified that the Union received "counterproposal" contract offers from the Company throughout the bargaining process. (Tr. 730-32). Blankenship tries to evade the fact that the Company made many contract proposals by calling them "counterproposals," but admits that Warrior's counterproposals were full contract documents. (Tr. 732). The Union leaders kept their members in the dark and elected not to present these proposals for a ratification vote. (Tr. 731).

Most if not all of the Petitioner's witnesses did not know the terms "unfair labor practice" or "ULP." Any alleged ULPs committed by Warrior were not considered to cause disaffection with the Union. (Tr. 294, 335, 363-64, 444, 490-91, 577). None of the signatories to the petition said anything about the forty-one (41) strikers who were not being reinstated in the return to work process as leading to any disaffection for the Union or their motivation for signing the petition. (Tr. 294, 336, 363, 375-77, 391-92, 417-18, 469-70, 519-20, 537-38, 578-80, 611-13).

In fact, many hourly workers were aware of the Union's violent and other prohibited strike-related misconduct and did not want the violent strikers to come back. (Tr. 468, 611-13). It was the Union's underlying misconduct—not Warrior's reasonable response to it—that led many unit members to become disaffected with the Union.

None of the petition signatories said they were signing because of the status of collective bargaining between Warrior and UMWA. (Tr. 294-95, 364, 395). Instead, the Petitioner's witnesses said their motivation was the UMWA itself and the way the UMWA—contrary to its pre-strike training of the unit—allowed the picket lines to become violent, tolerated intimidating actions on the picket line, put jack rocks on the roads, carried signs on the picket line that were attached to baseball bats, hit workers' cars with these signs and bats, engaged in name calling ("scab," "bitch," "bitch-whore," "coward," "pussy," "low-life traitor," "piece of sh__," and "son-of-a-bitch"), failed to communicate bargaining information from their bargaining team, and by picketers' severe intimidation, threats of retaliation against them, vehicular violence, throwing billiard balls at cars of workers, houses and vehicles shot with frozen paint balls, and threatened attacks burning up their homes. (Tr. 295-96, 318-24, 358-59, 372, 375, 384, 386-87, 396, 452-53, 491-98, 503-05, 532, 538). The testimony clearly demonstrates that "violence on the picket line was a huge factor." (Tr. 646). The picket line misconduct so severely placed workers' safety in jeopardy that workers had to ride into work with buses protected by metal cages over all the doors and windows. (Tr. 500).

The Union's most recent slate of alleged ULPs (which were not raised until the eleventh hour) also have no merit under the *Master Slack* analysis. Specifically, the alleged recent $1.00/hour wage increase, healthcare deductible and premium changes, shift changes, provision of meals by the Company, and removing the bulletin board and grievance boxes for painting did

not cause disaffection for the Union. These actions were not factors for the signatories of the representation election petition and did not influence the Petitioner's Witnesses or other signatories in any way. (Tr. 300-304, 338, 365-66, 401-04, 472-76, 505-06, 538-41, 596-601).[2] HR Manager Sterling confirmed that the temporary removal of the union bulletin boards and grievance boxes (which were empty at the time) were brief and resulted from wall painting projects at the mines. (Tr. 649, 652-54). They were "immediately put back up after the paint dried." (Tr. 649, 652-54). Sterling also described how the delivery of meals, which has been done for various reasons for many years, was increased during the strike but was provided before the strike too. (Tr. 651, 669-70). Finally, the RTW protocol for the strikers who came back after the Union's unconditional offer to return to work ("UORTW") was essentially the same for workers who had returned earlier in the strike and was not unfairly harsh for the latest returning workers in comparison, for example, to workers returning from FMLA leave after 60 days or more. (Tr. 562, 601-03, 670-71).

D. <u>The Union Caused Substantial Disaffection</u>.

Although it was often obvious and undisputed that Union people were committing many of the wrongful strike actions, the unit workers also attributed other unlawful conduct by unknown perpetrators to the Union because they happened at shift changes and near picket lines and workers' entrances to the mines. (Tr. 534). Petitioner's Witnesses also interacted with strikers who are recently returning to work after the UORTW and the RTW protocol. Some of

[2] These allegations are brand new. The Union only brought these new allegations after the hearing began—well after the Petition was filed. Indeed, Sanson was recalled to testify about these topics on which he had no personal knowledge. Regardless, and more importantly, the expired CBA expressly permits the Company to unilaterally increase miner pay and make changes to the health insurance plans, all subjects over which the Union and Company have already bargained. Specifically, Article III, Section (d)(1) of the CBA states that: "[Warrior] shall have the right to pay select job title(s) wage rates higher than those set forth in Appendix A, where [Warrior] has made such determination, in its sole discretion." Article XIV, Section (a) of the CBA also permits changes to the employee benefits plans so long as any such change affects Warrior's "non-Union employees" in a "substantially similar" way. That is, Warrior was entitled to make all of the changes about which the Union now complains.

these returning strikers have supported and even signed the petition as well because they wanted no more of the Union's "drama," jack rocks, and other bad behavior. (Tr. 305-308, 393-94, 510-11, 538). The Union's unlawful mass blockade of the Warrior entrance to No. 7 Mine that left hundreds of hourly miners at the mine for four or five hours after their shift ended also understandably caused disaffection toward the Union. (Tr. 453-54, 480, 501). For some witnesses, their disaffection with the Union arose from how negatively they saw Warrior's union members treat other people at the mines, such as non-dues-paying unit members and contractors. (Tr. 569). This treatment was not limited to the time period of the strike. (Tr. 569). One Petitioner's Witness explained that he had grown up in a street gang environment and wanted no part of these threats or conflicts between co-workers in his work life. (Tr. 570-72). Dunn said that if a rock falls on him underground, he did not want to ask if his co-worker was union or non-union before receiving help. (Tr. 574). Dunn also said that he went out on strike for almost a year not in solidarity with the Union but because he anticipated the Union's threats and intimidation and feared what those threats might cause him to do in response. (Tr. 581-87). Dunn did not want to commit criminal actions in response to the Union's provocation. (Tr. 581-87).

Unit members formed their own individual views that, with the Union representing them, everyone in the unit "had to be treated the same" and did not like that framework in their work situation. (Tr. 337). Others came to feel that the Union would say one thing and then do another, which caused a loss of trust and confidence in the Union. (Tr. 337). Some returning strikers wondered aloud "why did we even go on strike?" (Tr. 338). Some unit members who returned to work before the strike ended see a "wall in between the return[ing] ones and then the ones that's already crossed the picket line." (Tr. 348). Local Union President Carl White's treatment of contractors—for example, denying them access to the "union bathhouse"—caused disaffection

toward the Union for many bargaining unit members. (Tr. 461-64). Further, some of the Union supporters who are returning to work since the UORTW have been negative toward those who worked during the strike. Since returning, they have told those who worked during the strike that they do not deserve to be in the "union bathhouse," which has a "divisive effect." (Tr. 350). Cordial co-worker greetings have gone away for some, and returning union supporters walk by the "scabs" as if the workers who may support the Petition do not exist—diminished basic trust feels dangerous in a coalmine, where reliance on coworkers is essential to ensure safety in an underground environment. (Tr. 351-52). Some unit members lost trust in the Union after the Union gave them pre-strike training that violence and picket line misconduct would not be tolerated but thereafter not only tolerated it, but also led and encouraged it. (Tr. 427-28).[3] Some unit members understood that the Union's motivation in bargaining had nothing to do with the unit members and instead that the Union wanted to make Warrior pay more to the pension fund for retired workers, which caused further loss of trust of the Union. (Tr. 384).

IV. ARGUMENT

The Board, through the Hearing Officer, advised the parties that the Union, having made the motion for this Petition to be administratively dismissed under *Master Slack*, has the burden of proof and the Union "must present specific detailed evidence in support of its position, and general [conclusory] statements by witnesses will not be sufficient." (Tr. 22). *See Wendt Corp.*, 371 NLRB No. 159 (Sept. 30, 2022) (Member Ring, dissenting) ("The burden of proving that unfair labor practices tainted a decertification petition rests with the party alleging taint."). Warrior maintains that the undisputed factual record that led to this hearing and the record made

[3] See Employer Exhibits 13 and 14 that contained UMWA's mandatory strike and picketing training and the UMWA testimony about the Prohibited Conduct on which UMWA provided training at Tr. 800-08. Blankenship, who is often seen in the videos containing striker misconduct, says he saw no prohibited activity during the strike. (Tr. 807).

during the hearing compel a finding that the Union completely failed to meet its burden of proof under the *Master Slack* factors and, as a result, that the NLRB should permit and conduct an in-person representation election at Warrior's mine locations for the appropriate bargaining unit members as soon as practicable.

Section 7 of the NLRA provides that employees "shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing . . . and shall also have the right to refrain from any or all of such activities. . . ." 29 U.S.C. § 157. A petition signed by a majority of unit employees constitutes objective proof of a union's loss of majority support. *Wurtland Nursing & Rehabilitation Center,* 351 NLRB 817, 818 (2007); *Renal Care of Buffalo, Inc.,* 347 NLRB 1284, 1286 (2006).

In the context of decertification petitions, the Board has stated, "Evidence in support of a withdrawal of recognition must be raised in a context free of unfair labor practices *of the sort likely*, under all the circumstances, to affect the union's status, cause employee disaffection, or improperly affect the bargaining relationship itself." *LTD Ceramics, Inc.,* 341 NLRB 86, 88 (2004) (internal citations omitted), *enf'd,* 185 Fed. Appx. 581 (9th Cir. 2006). "Not every unfair labor practice will taint a union's subsequent loss of majority support or taint a decertification petition." *In Re Overnite Transp. Co.,* 333 NLRB 1392, 1393 (2001). Except where the unfair labor practice involves a general refusal to recognize and bargain, "there must be *specific proof of a causal relationship* between the unfair labor practice and the ensuing events indicating a loss of support." *Id.* (emphasis added).

A. The Board's *Master Slack* Factors.

The applicable legal criteria for evaluating the Union's claim that disaffection with the Union among its unit members is caused by Warrior's alleged unfair labor practices—also known as the four *Master Slack* factors—include:

1. Length of time between the ULPs and the filing of the RD petition;
2. Nature of the violation, including the possibility of detrimental or lasting effect on employees;
3. Tendency of the violation to cause employee disaffection; and
4. Effect of the unlawful conduct in employees' morale, organizational activities, and membership in the UMWA.

Id. (quoting *Master Slack Corp.*, 271 NLRB 78, 84 (1984)). In other words, the Board cannot simply assume that decertification petitions have been tainted by the employer. *See Lee Lumber & Building Material Corp*. ("*Lee Lumber I*"), 322 N.L.R.B. 175, 177 (1996); *Master Slack*, 271 N.L.R.B. at 84. The Union must establish such effect under the *Master Slack* framework. As described more thoroughly below, the UMWA has completely failed to meet its burden in this respect.

1. Union Claims Based on Alleged Warrior ULPs.

UMWA presented its *Master Slack* case based loosely on multiple unfair labor practice complaints that it has filed since March 2021. As reminded by the Board's Hearing Officer in the hearing, "The nature and the impact of the violation, those are the factors… we're talking about the nature of the impact." (Tr. 152).

a. Information Charges. On March 30, 2021, the Union filed a ULP complaint based on its March 19, 2021 collective bargaining-related Request for Information ("RFI") (the "Original

Information Charge") and amended it on August 16, 2021 (the "Amended Information Charge") (together the "Information Charges"), on which the Regional Director issued a complaint September 17, 2021. The Information Charges were tried before an NLRB ALJ in February 2022 and remain pending a decision by the ALJ at this time, for more than a year since the case was taken under submission.

b. Side Letter Charge. On August 2, 2022, UMWA filed a ULP complaint (10-CA-300553) concerning Warrior's bargaining proposal for a side letter addressing the unlawful misconduct of certain strikers during the course of the strike that would result in such strikers being ineligible to return to work at Warrior when the strike ends (at that time, the names of the strikers who had made themselves ineligible to return to Warrior had not been determined and had not therefore been disclosed) (the "Side Letter Charge") (10-CA-302720). In response to the Union's demands, on August 29, 2022, Warrior provided a list of names of strikers who had engaged in such misconduct as to disqualify themselves from returning to Warrior at the end of the strike.

c. Misconduct Charges. On September 9, 2022, UMWA filed another 41 individual ULP complaints on behalf of 41, now 40, strikers (the "Misconduct Charges" on the "List of 41") (now 40 individual case numbers) based on Warrior's disclosure to the Union of the names of the strike-misconduct-ineligible strikers in response to Union requests and the Side Letter Charge. At the time of the hearing, the NLRB had found merit in only three of the 41 complaints.

d. Omnibus Charge. On February 10, 2023, the Union filed its Omnibus Complaint alleging several items including duplicating the Misconduct Charge, refusal to allow mine inspections by strikers during the strike, refusal to provide information needed for the Union's

decision to make an unconditional offer to return to work, making "predictably unacceptable offers" to the Union, and finally a restatement of the Information Charges (10-CA-311946).

e. <u>CBA Changes Charge</u>. On May 4, 2023, after the hearing had started, the Union filed a ULP complaint (10-CA-317454) for Warrior's alleged failure or refusal to bargain over allegedly impermissible unilateral changes to terms and conditions covered by the 2016 collective bargaining agreement ("2016 CBA") (the "CBA Changes Charge").

The Board has not, at this time, advised the parties of any finding of merit in the Side Letter Charge, the Omnibus Charge or the CBA Changes Charge, all of which are disputed vigorously by Warrior. Therefore, the *Master Slack* analysis should only focus on the Information Charges and only three of the Misconduct Charges (See Tr. 65, 666), which are all based on remotely-distant conduct in relation to the April 6, 2023 RD Petition.

2. <u>*Master Slack*: The Remote Timing of the Alleged ULPs From the Filing of the Petition</u>.

In relation to the Original April 6, 2023 Petition, the Information Charge was filed March 30, 2021 (Tr. 35), more than two years before the Petition. The Union confirmed that by October 2021, in the wake of undisputed striker violence against Warrior people and property and well more than sixteen months before the Petition was filed, Warrior told the UMWA that certain individuals would not be permitted to return to work at Warrior after the strike. (Tr. 43). The Side Letter Charge, which related to the same issue of striker misconduct preventing certain strikers from returning to work at Warrior, was filed on August 2, 2022, more than seven months before the Petition. Under any legal standard for remoteness in employment law causation analysis, these occurrences are too remote to be regarded as causally connected to worker disaffection leading to signing the Petition. Even the Union's Amended Information Charge was filed August 16, 2021, a year and seven months before the Petition. Therefore, from the primary

frame of reference, the time period lapsing between events, the ULPs are so remote in time from the Petition as to require no further analysis. *See Standard Reg., Inc. d/b/a Taylor Commc'ns & Loc. 594-s, Dist. Council No. 9 of the Graphic Commc'ns Conf. of the Int'l Bhd. of Teamsters*, No. 05-CA-194336, 2018 WL 1064571 (Feb. 26, 2018) ("The 9 months between the wage increase and the poll are too remote to establish a nexus—particularly in the absence of employee testimony to that effect."); *In Re Champion Enterprises, Inc*., 350 NLRB 788, 791–92 (2007) ("All of these violations occurred between 5 to 6 months before the petition and withdrawal of recognition. Thus, we find that these incidents were too remote in time to have caused the employees' disaffection with the Union."); *Garden Ridge Management*, 347 NLRB 131, 134 (2006) (5-month gap weighed against finding that unfair labor practices caused disaffection). Generally, temporal proximity is considered sufficient under the first *Master Slack* factor if the relevant events occur within days or weeks of each other—not years. *See, e.g., Tenneco Automotive, Inc. v. NLRB*, 716 F.3d 640, 649 (D.C. Cir. 2013) (stating that *Master Slack*'s "temporal factor typically is counted as weighty only when it involves a matter of days or weeks"); *see also Bunting Bearings Corp*., 349 NLRB 1070, 1072 (2007) (eight to fifteen days temporal proximity); *RTP Co*., 334 NLRB 466, 468 (2001) ("close temporal proximity" when ULPs occurred two to six weeks before petition).

The UMWA also contends that Warrior slowed the bargaining process by requesting that the parties reach some ground rules before the bargaining got into it substance. Of course, the formation of ground rules through bargaining is certainly lawful. (See, Tr. 31). Moreover, the Union was never so disturbed by this reasonable request for ground rules that it ever filed a ULP. Indeed, the Union never filed a ULP alleging undue delay by Warrior in bargaining via its request to set ground rules. Moreover, the request did not pose any practical hurdles to

bargaining. In fact, the parties reached a CTA merely days after the UMWA's strike began. Thus, the understandable insistence on bargaining ground rules (which the parties jointly agreed to) clearly did not lead to any disaffection with the Union. This nonsensical argument from the Union does not change the fact that the two-plus years between the Information Charge and the decertification petition is far too remote to satisfy the first *Master Slack* factor.

In a second frame of reference, practical remoteness, which considers the surrounding circumstances and the effective remoteness of the events that are so long ago and so much less memorable, the potential effects of these two ULPs were not even discernable. The strike began on April 1, 2021 and the Union publicly announced a complete tentative agreement ("CTA") on April 5, 2021 (Tr. 156). The Hearing Officer asked Blankenship "How was the Union able to reach a [CTA] without that [RFI] information?" Blankenship had no discernable answer, and the Hearing Officer just put into words that "you were agreeing to lesser changes than you felt you could've got with the information." (Tr. 748-49). Thus, the Union leadership did not require more information in order to be satisfied with and present the CTA.

The unit voters rejected the CTA on April 9, 2021 with over a 95% rejection vote. (Tr. 156). Sanson confirmed that the concerns expressed by unit members following the vote on the CTA were individualized, but all were about the CTA itself. (Tr. 158). Between April 9 and early May, none of the unit members raised any concerns about the status of Warrior's responsive document production to the Union. (Tr. 158-59). Clearly, that was not a concern on their minds at that (or any other) time. (Tr. 158-59). Blankenship testified that when he told unit members that Warrior was not giving the Union the information it needed to bargain a new CBA, no unit members ended their Union membership over his answer to them. (Tr. 751). Blankenship also said about strikers who later crossed the picket line, he never asked them why they did so, and

his co-worker Larry Spencer never told him what reasons others gave who crossed the picket line. (Tr. 753-54).

At that point, Warrior was in the early stages of providing the Union with thousands of pages of documents containing requested information. In April, May and June, with lawful state court Temporary Restraining Orders and Injunctions in place, the Union designed, inspired, organized and led a campaign of misconduct, violence and other lawlessness that resulted in findings on July 23, 2021 that the International, District, and Local Unions were in civil and criminal contempt of court. This Union misconduct led to ULPs against the Union and ultimately led to NLRB findings of the Union's ULPs and massive fines that resulted in the Union's payment of over $400,000 to Warrior in September 2022. This strike-related misconduct was never disputed by the Union.

As alleged by the Union, the Region has determined that 3 out of 41 Misconduct Charges have "partial merit." (Tr. 57) The Union offered general conclusory testimony that it has heard from members that they are upset that certain strikers may not be returned to work and say they will not return to work at Warrior until those 41 others do. With the Union's UORTW (which unnamed members refer to as the "unconditional surrender") this general supposed demand from members is unattainable due to the Union's actions. (See Tr. 51-63). As a practical matter, there is no indication that the alleged Information Charges or the Side Letter Charges caused bargaining unit members to become disaffected from the Union and sign the Petition when the Union had singlehandedly wounded itself on this scale.

Although it is said that credibility plays no part in the hearing, Sanson (the UMWA's Secretary-Treasurer since June 2021 and lead negotiator in bargaining with Warrior) actually testified that "during negotiations," he did not ever learn the basis of the alleged misconduct. (Tr.

46). Sanson testified, "…there was every wild theory in the world about why somebody ended up on this list. And all of them were just rumors that we couldn't address because we didn't have any factual basis of understanding how the company came to its conclusions." (Tr. 50-51, 162-63) Warrior's CEO and the UMWA President were allegedly having conversations and, according to Sanson, well before UMWA received the list of 41 on August 29, 2022, Warrior told the UMWA that the number might be as high as 50 or 60 strikers. (Tr. 160-61). It strains credulity to suggest that the two chief executives were conferring on this subject in 2021 and 2022 and the UMWA had no idea why certain strikers were regarded as ineligible for RTW due to strike-related misconduct. Even Sanson admitted, "there was some evidence" that supported the state court civil and criminal contempt findings. (Tr. 165-66).

Ultimately, the chronology of the undisputed Union misconduct which led to the disclosure of the List of 41 in August 2022 – and the temporal distance from the Petition – undermines any causal nexus to the disaffection.

3. *Master Slack*: The Nature of the Alleged Violations have No Possible Effect on Other Employees.

Considering the 2021 findings of civil and criminal contempt, 2022 NLRB findings of ULPs by the Union and 2022 payment of the unprecedented fine by the Union, none of which contained any Union evidence to counter the volumes of Warrior evidence, the fact that forty-one striking miners were under consideration for loss of the right to return to Warrior as employees was inevitable. No reasonable person can say that the Company's decision to identify particular strikers as ineligible to return due to misconduct caused the unit members to be disaffected from the Union.

By contrast, the only reasonable inference is that many unit members looked at the Union's leadership in conducting unlawful mass demonstrations—including undisputed violence

against the Company's people and property—and questioned whether the Union was their preferred representative. The Company's confirmation that certain strikers who engaged in misconduct would not be returned to work may have gotten some attention, but the Union cannot shift the blame and fairly argue that Warrior caused unit members to be disaffected by these actions. The Union's responsibility for alienating its own is absolutely true, even aside from the fact that the topic of strikers returning to work was not close to fruition at that time and the Company only disclosed the names because the Union demanded that their names be disclosed. With more time, and in advance of the Union's UORTW, the Company could likely have compiled a list that was flawless even in the eyes of the NLRB. If the NLRB finds that some of the 41 strikers did not engage in sufficient misconduct to be denied employment with Warrior (which it should not), then the substantial majority will still be denied re-employment under the Company's decision of August 2022 and the Union and those individuals will be responsible for the related wrongdoing, not Warrior. Again, the Company's August 2022 decisions were still more than seven months before the Petition was filed. *See, e.g.*, *Champion Enterprises*, 350 NLRB at 791–92; *Garden Ridge Management*, 347 NLRB at 134.

The apparent disaffection of many unit members was simply ordinary and natural under the totality of the circumstances. The alleged ULPs were not a factor—much less a controlling factor. After the picket lines became violent, State police had to escort workers through the picket lines, which was "especially" discouraging to strikers. (Tr. 917). Having State police protection from picket line violence is not a ULP. The UMWA submitted its UORTW at Warrior on February 16, 2023 and the RTW process began through dialogue between Warrior and the UMWA. Union Committeeman Jeff Fleenor confirmed that strikers felt caught "between" the Union and the Company and had "anger that [they] were going back in there without a contract."

(Tr. 921). By March 16, 2023, all the striking employees who elected to pursue the opportunity to RTW at Warrior had taken the drug test, awaited the fitness for duty physical examination, and required MSHA annual ART. The RD Petition was filed April 6, 2023 while the strikers who elected to return to work at Warrior were returning.

As a logical proposition, the UORTW and the following RTW were major events preceding the Petition and are the likely stimulus for many who signed the Petition. The Union had led the strike for almost two years and was now recommending that its strikers RTW without a new contract and without conditions. No one can assert credibly that the strike had been a success for the members of the unit. At the same time, many workers at Warrior who crossed the picket line were about to be working alongside strikers who, under Union leadership and organization, had engaged in violence and intimidation of the non-striking workers. No set of circumstances could be more compelling as the cause of disaffection with the Union than these most recent developments.

The Board consistently has held the type of violations that have a detrimental and lasting effect are those involving coercive conduct such as discharge, withholding benefits, threats, etc. *See JLL Restaurant, Inc.*, 347 NLRB 192, 193 (2006) (threatening employees with closure and job loss); *Beverly Health and Rehab. Servs., Inc.*, 346 NLRB 1319, 1328-29 (2006) (discharging active union supporter and unilaterally changing hours and vacation); *M&M Automotive Group, Inc.*, 342 NLRB 1244, 1247 (2004) ("changes involved the important, bread-and-butter issues of wage increases and promotions"); and *Overnite Transp. Co.*, 333 NLRB 1392, 1392 (2001) (employer committed "hallmark" violations). The unique, underlying issues in this strike are materially different from those hallmark violations in Board precedent.

Accordingly, there is simply no evidence of any disaffection with the UMWA as a result of alleged unlawful practices by Warrior.

4. *Master Slack*: The Alleged Violations have no tendency to cause disaffection from the Union.

The D.C. Circuit observed in *Tenneco* that the third *Master Slack* factor is related to the second factor "because unfair labor practices that have a lasting effect on employees are likely to be serious enough to cause disaffection with a union." 716 F.3d at 649. Thus, the kinds of unfair labor practices most likely to cause disaffection with a union are the same ones that have a lasting impact on employees: discriminatory discharges; threats of job loss or plant closure; unilateral changes in key terms of employment, such as wages. *Id*. at 650.

The alleged Warrior violations—which involve the pace of providing information to the Union bargaining team and the application of lawful rules governing employee discipline to strikers who engaged in unlawful misconduct in connection with the Union's campaign of intimidation—are not the types of behavior that can reasonably be described as affecting employees against the Union. *See Mathews Readymix*, 165 F.3d at 78 ("more than a bare-bones violation . . . is needed to support the inference that the employer's unlawful conduct may have influenced the employees to sign a petition"); *Howe K. Sipes Co.*, 319 NLRB 30, 40 (1995) ("no reason to believe that the type of [ULPs] found here, primarily the failure to provide the union with certain information, could or would tend to cause disaffection with the Union.") (emphasis added).

UMWA called Sanson as its first witness (Tr. 21). In just the third month of the strike, Sanson replaced Levi Allen in both positions after the CTA had been rejected by a 95% vote of the unit, which was a very inauspicious beginning for the UMWA leadership (See Tr. 26). The UMWA's delivery of a CTA that was resoundingly rejected and the 2023 UORTW are the

bookends of this strike. These two events—and many of the various and undisputed instances of unlawful Union activity in between these two events—led to substantial disaffection with the Union among those they represented.

Sanson testified and confirmed many significant facts. Although the UMWA had been anticipating the 2021 CBA negotiations for over two years, the March 19, 2021 RFI was their first such request. (Tr. 105, 187). The Union never filed a grievance or went to arbitration over any request for information about subcontractors during the term of the 2016 CBA. (Tr. 188-89). The Union went on strike just eleven calendar days after the massive RFI was sent to Warrior. (Tr. 108-9). Sanson acknowledged the obvious: the Union could have requested the contractor information during the five-year term of the 2016 CBA, but instead chose to file an absurdly lengthy RFI on March 19, 2021 so they could go on strike April 1, 2021 and call it an unfair labor practice strike. (See Tr. 150). Sanson knows of no affirmative announcement by the Union that it endorsed approval of the CTA. (Tr. 112). However, he confirmed that taking the CTA to the unit voters in and of itself, despite the outstanding March 19 RFI, was an endorsement of the CTA. (Tr. 112). Sanson testified that when the UMWA bargaining committee took the CTA to the unit for a vote, "it wasn't [done] intelligently." (Tr. 183).

Sanson and UMWA have no personal knowledge of what motivated the Petitioner to circulate the petition to others to sign. (Tr. 114-5). No one has ever said to Sanson that he wants to decertify the Union so he does not know why any person who signed the petition was motivated to do so. (Tr. 119). Sanson admits that union workers asked him, in reference to the ULP findings against the Company and against the Union, "Why can Warrior Met get something processed so quickly and we have to wait so many months to get our day in court…." (Tr. 125). Union employees also expressed dissatisfaction to Sanson about the Union's UORTW. (Tr. 130).

Blankenship says that he cannot name any Union striker who "turned in their Union membership" over the UORTW or because the forty-one miners were being discharged. (Tr. 756-57). Sanson says he answered such statements from his units by saying: "The price of coal is high, and financially we are not effective at this point in time with this strike based upon the injunctions and – you know, everything that we've been working towards here. We believe it is in the best interests of everyone that we return to work." (Tr. 130). Sanson told the unit members that the labor laws in this country are effectively broken, but, rather than tell the unit about how the Union had no evidence with which to dispute the NLRB's findings of violence and other unlawful striker conduct, Sanson "still spent a lot of time blaming" Warrior. (Tr. 139-40).

Some individuals who were on strike have gone back to work and at least 170 strikers did not even want to take the drug test. (Tr. 131). UMWA acknowledges that their UORTW was indeed unconditional as a matter of law and Sanson reinforced this understanding in "every conversation" they had with Warrior on the subject. (Tr. 132).

The miner representative inspection issues were due to MSHA changing the law and long preceded the Union's UORTW. (See Tr. 167).[4] Once there was an UORTW, the UMWA team was permitted to do the inspection of the mine that they requested and it was allowed timely before strikers RTW. Sanson admits, but says they were trying to make a decision about whether

[4] Section 103(f) of the Mine Act states, in relevant part that "a representative authorized by his ***miners*** shall be given the opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine." 30 U.S.C. § 813(f) (emphasis added). Section 3(g) of the Mine Act defines a "miner" as "any individual working in a coal or other mine." 30 U.S.C. § 802(g). For over thirty years, the Federal Mine Safety Health Review Commission has held that striking employees do not constitute "miners" under the Mine Act for purposes of designating miners' representatives. *See Cyprus Empire Corp*., 15 FMSHRC 10 (Jan. 1993). Because striking employees are not "miner[s]" under the Mine Act, the Commission unanimously held that "striking employees of Cyprus were **not** entitled to have their previously designated walkaround representative accompany the MSHA inspector during his inspection of the mine." *Id*. at 15 (emphasis added). Despite recent efforts to change this long-standing Commission's precedent, neither MSHA nor the UMWA has been able to undercut this correct interpretation of the Mine Act. Accordingly, Warrior has acted in full compliance with the law at all times in denying access to its mines to any and all individuals who have not been properly and validly designated as miners' representatives by its miners. Warrior's actions in this respect, which are fully compliant with the Mine Act and Commission case law, certainly do not constitute a ULP.

it was safe to make an UORTW. (Tr. 170-71). Sanson admits that he does not recall any communications with Warrior that the UMWA was trying to figure out if it was safe for strikers to RTW. (Tr. 172). Sanson admits that under the 2016 CBA, Cecil Roberts and he had the contractual right to visit and inspect the Warrior mines and they were never denied such access. (Tr. 173)(U-1, CBA page 7, D4).

Again, the Union's hearing "evidence" of disaffection points towards its own actions – not Warrior's – as the cause of the decertification petition.

5. *Master Slack:* Effect of a ULP on The Morale, Organizational Activities or Membership in the Union.

The Board has repeatedly found that a failure to furnish information does not tend to cause disaffection where the evidence fails to show that unit employees knew of it. *See Champion Home Builders*, 350 NLRB at 792. "Unless their union tells them what the employer is doing--and not doing--in collective bargaining, employees typically will not be aware of violations committed in bargaining." *J.G. Kern Enterprises, Inc.*, 371 NLRB No. 91 (Apr. 20, 2022) (Member Ring, dissenting in part). Here, there is a conspicuous lack of evidence that the unit employees knew the status of Warrior's ongoing production of documents in response to the UMWA's voluminous request for information. *See Renal Care of Buffalo, Inc.*, 347 NLRB 1284, 1297 (2006) (finding employer's failure to provide information relevant to formulating bargaining proposals did not cause employee disaffection where employees were not involved in drafting the information request nor were aware of any issues surrounding it); *Gulf States Mfrs.*, 287 NLRB 26, 26 (1987) (finding employer's refusal to provide information did not contribute to employee disaffection with the union where the record failed to indicate that the employer's position was disseminated to the employees). Even if, in theory, the Information Charges could lead to some disaffection for the Union in a manner attributable to Warrior, the expansive

temporal gap in this case erases any possibility of a causal connection between the two. *See J.G. Kern*, 371 NLRB No. 91 (Member Ring, dissenting in part).

The Union testimony provided by Blankenship reveals that, notwithstanding the massive RFI, the Union particularly wanted more information about three subjects: (i) Warrior's attendance policies and practices, (ii) Warrior's use of outside contractors, and (iii) Warrior's List of 41 miners who could not return due to misconduct. (Tr. 699-712). There is no testimony from any member of the bargaining unit that the attendance policies and practices were on their minds or that the Union's lack of progress on the attendance policies issues caused disaffection for the Union. Similarly, the Union never took the contractor issue to arbitration between 2016 and 2021. (Tr. 842). The record regarding contractors is that in the CTA the Company agreed to reduce the allowable percentage for contractor services from 25% down to 20% and Union leadership agreed. (Tr. 777). The record also shows that the Company has provided great amounts of contractor invoices to the Union while the Union baselessly says they need something different. (Tr. 36). No bargaining unit member has said that the lack of bargaining progress on the subject of contractors has caused him or her to be disaffected from the Union. As for the forty-one strikers, the Company raised this topic in August 2021, provided the names in August 2022, and gave the Union explanations of the grounds for each person in September 2022. (Tr. 893). The record of the strike, of which judicial notice has been taken, demonstrates substantial evidence of the misconduct of those 41 strikers and the particular misconduct in which they engaged. If any disaffection is related to this subject, it is only because of the Union's decision to make their UORTW without resolving the issues for the 41 strikers.

6. UMWA Actions Alone Caused Substantial Disaffection.

The decisions and actions of the Union caused the disaffection that exists in 2023. UMWA has an undisputed record of regrettable actions in the course of this labor dispute. UMWA did not prepare diligently for bargaining with Warrior in 2021 as reflected by the massive RFI of March 19, 2021, which should never have been sent with so many unnecessary requests. UMWA could have anticipated its bargaining priorities and targeted specific priority information that could reasonably be collected with enough advance notice before the strike. Instead, as they "do all the time," UMWA waited until bargaining had started and then exercised no restraint in the scope of its information request. (Tr. 781). UMWA inflexibly decided to strike on April 1, 2021 and then strategically confused the unit about the circumstances by labeling the dispute as an "unfair labor practice" strike (UMWA correspondence dated March 31, 2021). The strike was plainly not a ULP strike. The picketing promptly became unruly and then violent from April 1-4, 2021, notwithstanding the UMWA's "training" of its unit members on how "prohibited" conduct was impermissible. This is especially troubling for the UMWA which has a history of violence and misconduct going back for decades.

a. UMWA Approach to CTA.

While the Union claimed a need for more information, they reached a CTA with Warrior on April 5—only five days into the strike—and took the new deal to its unit members for a vote. Contrary to the agreed rules of bargaining between the Union and Warrior, UMWA then declined to support the CTA, and they lost the ratification vote by 95%. Local 2245 President Brian Kelly confirmed that the bargaining unit was "upset" with the Union over the CTA the Union brought to them. (Tr. 903-04). At the same time, they violated their bargaining rules with Warrior (Employer Exhibit 12) and did not foster a positive environment for future bargaining.

Blankenship testified in regard to the CTA that the Union made no recommendation and took no position, up or down, on whether the unit members should support it. (Tr. 696-697, 813-815). Local President Kelly also said the Union leaders who delivered the CTA did not recommend ratification of the CTA. (Tr. 882).

Blankenship cannot recall what "ground rules" the Union agreed to with the Company. (Tr. 763). Although Blankenship, as a member of the Union bargaining team, admits that the ground rules "applied" to him (Tr. 792), the Union's position is that Blankenship was "not individually bound by" the ground rules. (Tr. 793). Either way, Blankenship "never read them." (Tr. 794). In the wake of the resounding rejection of the CTA by unit voters, the UMWA dedicated its efforts to violence and intimidation of Warrior and its employees and contractors.

b. UMWA's Orchestrated Violence – Punished in Public.

The Union's actions, which remain undisputed in the courts, resulted in at least five injunctions and two temporary restraining orders, which limited their picketing and found them in civil and criminal contempt of court. Local President Brian Kelly affirmed that "picket line misconduct caused [fellow Union members] to feel . . . disaffection to the Union." (Tr. 869). Kelly confirmed that he engaged in an orchestrated arrest at No. 7 Mine North and was one of the people taken to jail by Sheriff's deputies, charged with criminal trespass, and subsequently pled guilty. (Tr. 874, 908). Kelly says he does not know of a single unit member—not one—who has terminated or withdrawn their Union membership in the past two years, which actually says something about the lack of any disaffection with the Union. (Tr. 880).

As the Board evaluates this *Master Slack* factor, it must have in mind the proven record of UMWA misconduct in 2021 that led to civil and criminal contempt in 2021 and unfair labor practice findings in 2022 against the UMWA. The Board must also consider that such findings

were entered in Alabama state court and in the NLRB without any evidence or arguments in opposition by the UMWA. The Union had every opportunity to present its case to refute, or even minimize, the allegations and evidence of their wrongdoing. Instead, they submitted nothing. All of the evidence against the UMWA was put into the public record and the Union has full access to it. The Union resorted to the weakest form of denial by claiming, as Blankenship said, that they did not see the misconduct. The Union might be allowed this denial if they had stayed silent on the sidelines, but that is not what happened. The Union was central to the planning and execution of these unlawful tactics.

c. <u>UMWA's Own ULP and Massive Damage Payment</u>.

As proven in this NLRB hearing, many workers do not support UMWA when it behaves hypocritically by purportedly prohibiting violence, but then organizing, leading and praising violent and otherwise unlawful misbehavior by its agents. Warrior filed ULP complaints against the UMWA for its violent and unlawfully intimidating strike-related conduct. The NLRB issued charges against the UMWA, which the UMWA did not (because it could not) dispute factually. The NLRB charges resulted in Board findings, to which the UMWA stipulated, of numerous severe violations of federal labor law followed by UMWA's voluntary election to pay Warrior over $400,000 in damages in the summer of 2022. This unprecedented payment of massive damages along with the Board's numerous findings of wrongdoing put the Union in bad light of its own making and naturally caused its own members to view the Union as unlawful and perhaps ineffective representatives.

d. <u>UMWA's Mishandling of the List of 41</u>.

When the Union has engaged in so much violence and other unlawful acts without disputing any of them in several state and federal administrative court proceedings, it is only

natural and obvious that it had participants who would be deemed ineligible to return to work at Warrior. UMWA and Warrior had been discussing this fact between its leaders starting in October 2021. (Tr. 326-27, 331-32, 388-89, 414-15). Blankenship said that unit members he spoke to in 2022 were frustrated not to know who was on the list of forty or what they did to get on the list. (Tr. 711). He said the "morale was bad" for unit members as a result. (Tr. 713). There is no evidence that this caused any disaffection for the Union among unit members.

No objective observer can look at the circumstances of the UMWA's approach to this labor dispute and not expect many workers to be deemed ineligible to return to work. Although the Union is properly held legally responsible under the circumstances, individual persons committed these unlawful acts of violence and intimidation and those actors can be held accountable, as a matter of law, for their actions and lose their rights to employment at Warrior. Moreover, when the Union made its own decision to make an unconditional offer to return to work without a new CBA, it had to expect that some of its unit members would not view the outcome of the strike positively. All UMWA actions combined lead inevitably to the conclusion that this strike has not been successful for those whom they represent.

When the Company in August 2022—with no known prospect of an UORTW and after a year of dialogue in private bargaining about the issue—responded to the Union ULP complaints (See, U-6) and provided names of strikers whose conduct was regarded as grounds for lawful discharge, the Union's response was telling. The Union did not provide the unit members with the context of yearlong discussions with the Company on the subject. The Union did not remind the unit members of all the serious striker misconduct that was proven, undisputed, and already sanctioned and/or penalized in at least two legal forums. Instead, the Union leaders (like Sanson, Blankenship and Kelly) told unit members that they did not know anything about any

misconduct, had no idea why the Company would not simply return these workers to Warrior when the strike ends and told the frightened strikers that the Company will not even tell us what the List of 41 did wrong. They also published the List of 41, blamed the Company for wrongdoing, and began to scare their own unit members about being fired. In so doing, the Union leaders mischaracterized the circumstances of the Company's actions to put the Company in the worst possible light in a transparent attempt to portray the Union and the List of 41 as victims of unfair treatment. The Board must see the Union's actions for what they are and not simply adopt the Union's position that no striker did anything warranting a loss of the right to return to work at Warrior.[5]

The Union baselessly claims that the Company's determination that the forty-one strikers should be discharged and not returned to work caused unit members to stop supporting the Union. As explained above, Warrior provided the names to the UMWA in response to the Union's pressure for such information long before there was any imminent return to work from the strike. The undisputed misconduct of many strikers is a lawful basis on which to deny them reinstatement. Blankenship confirmed that from August to October 2021, Warrior informed the Union and raised in negotiations that the misconduct of many strikers would result in Warrior not bringing them back to work after the strike. (Tr. 708-10). Therefore, the subject had been discussed for many months in 2021 and 2022 before the list of names was developed and provided in response to the Union's demands for the names. The evidence from the Board's hearing is abundant that the misconduct, intimidation and violence of the strikers was the cause

[5] The legal standard for determining if striker misconduct warrants a loss of the right to return to work may have changed since the submission of Warrior's position statement in November 2022 (See Lion Elastomers LLC, 16-CA-190681, 16-CA-203509 and 16-CA-225153, May 1, 2023), but this has no effect on the *Master Slack* analysis.

of workers' disaffection and not the fact that those forty-one strikers face consequences for their actions.

7. Warrior's Discharge of Strikers for Misconduct is Lawful.

The Union's position is that Warrior committed an unfair labor practice when it determined that when the striking workers return to Warrior, forty-one of them would not be allowed to return because of strike-related unlawful misconduct by some of the striking employees. More recently, in the context of the RD Petition, the Union claims that Warrior's response to the Union on August 29, 2022 caused disaffection of unit members with the Union and is a basis for denying the Petitioner and hundreds of other miners at Warrior the opportunity, or right, to cast a vote on whether to have UMWA continue as their certified bargaining representative. At this time, the NLRB has advised the parties that only three of the 41 strikers who are on the list may have maintainable claims for unlawful termination of their employment.

Warrior submitted its position statement on November 8, 2022 concerning the Misconduct Charges (10-CA-303168 et al.) disputing the legitimacy of the charges and urging that no further Board investigation be undertaken in light of the volumes of evidence of legally-sufficient misconduct by the forty one strikers, which justified their discharge. The Company's position statement of November 8, 2022 is incorporated herein by reference and is part of the extra-hearing record of which the Board has taken judicial notice.

In November 2022, the List of 41 was still theoretical because many strikers, including the 41, remained out on strike. Since then, on February 16, 2023, the Union informed Warrior of the Union's UORTW and the RTW process has been the subject of dialogue between the parties. The RTW protocol of drug screens, fitness-for-duty physical examinations and MSHA's required ART has been ongoing resulting in hundreds of strikers having returned to work at Warrior.

However, consistent with indications from Warrior at least since the International, District and Local Unions were found in civil and criminal content of court on July 23, 2021, with no opposition filed by the Union, the strikers who engaged in more egregious misconduct have not been returned to Warrior. Warrior maintains that its discussions with the Union and its employment decisions regarding the List of 41 are not only lawful, but have had no causal relation to disaffection of unit members from the Union. Instead, in addition to the disaffection of unit members caused by the egregious misconduct itself, the Union's leaders' statements distorting the facts related to the List of 41 have obviously been the cause of any such disaffection. Warrior's position statement fully and accurately outlines the discreet actions and confidential circumstances of the Company that resulted in providing the List of 41 to the Union on August 29, 2022.

V. WARRIOR'S POSITION ON VOTING

The Board's customary relevant period for determining individuals eligible to vote in any directed election on the Petitioner's decertification is inappropriate, by itself, under the circumstances of this case. The UMWA declared its alleged unconditional return to work from the strike on February 16, 2023; however, the duration of the strike and substantial time that strikers had away from the dangerous work of mining requires certain safety-sensitive pre-requisites to return to work, including a preliminary drug test, a physical, and completion of the ART. The Petitioner's petition was filed on April 6, 2023; nearly two months after the UMWA unconditionally ended the strike but before a substantial number of returning strikers had completed the RTW protocol.

Still, on March 16, 2023, three weeks prior to the filing of Petitioner's petition, a key RTW milestone passed—the deadline for returning strikers to complete the required drug test.

To ensure a full and fair opportunity to vote for all those employees currently employed and those who had demonstrated an intent to return from the strike, the best method for determining eligible voters is to combine the lists of those already working during the relevant period immediately preceding the filing of Petitioner's petition (which includes permanent replacements, new hires, and other bargaining unit employees who either did not originally go out on strike or crossed the picket line) with those returning strikers who had, as of March 16, 2023, completed the first part of the RTW protocol, a drug test. Such a hybrid voter list most closely fulfills the Board's interests in ensuring that eligible voters have not been supplemented or diluted post-petition while also giving the greatest effect to the rights of returning strikers. Such a hybrid list avoids thorny and circumstance specific determinations about which of the strikers resigned, found alternate permanent employment, died, or otherwise abandoned employment with Warrior between April 1, 2021 and March 16, 2023.

The only reasonable alternative to such a hybrid approach would be for the Board to declare a new relevant period on or after June 15, 2023, when all returning strikers are reasonably expected to have completed the RTW protocol. Thereafter, the election should be scheduled for manual, in-person, on-site balloting consistent with long-standing Board precedent, which is what the Petitioner has requested and Warrior's witness has confirmed is reasonable under the circumstances.

A. <u>The Appropriate Voter List Is the Relevant Period Plus Returning Strikers Who Completed a Drug Test Prior By March 16, 2023</u>.

"Congress has entrusted the Board with wide discretion in establishing the procedures to insure a fair election." *Heavenly Valley Ski Area v. N.L.R.B.*, 552 F.2d 269, 272 n.1 (9th Cir. 1977) (citing *N.L.R.B. v. A. J. Tower Co.*, 329 U.S. 324 (1956)). "The Board's discretion extends to fixing the eligibility dates for voting in elections." *Id.* (citing *Cone Brothers Contracting Co.*

v. NLRB, 235 F.2d 37 (5th Cir. 1956); *NLRB v. Wackenhut Corp.*, 471 F.2d 761 (6th Cir. 1972)). In a typical case, the determining factor for individuals eligible to vote has been the relevant period, a payroll period immediately preceding the Notice of Election. *See* Nat'l. Lab. Rel. Bd. Casehandling Manual, Part Two, Representation Proc. § 11086.3 (2020). The Board is empowered to determine alternate arrangements whenever "current labor dispute[s], seasonality of operations, the pending of the petition, etc." call for such arrangements. *Id.* at §§ 11086.3, 11312.1. Although strikers are generally presumed—for purposes of a decertification election—to have returned from strike immediately upon the union's unconditional offer to return to work, other relevant factors (including safety requirements) may lawfully affect who and when such workers actually return. *See Bingham Willamette*, 282 NLRB 1192, 1194 (1987); *Clow Water Sys. Co., Div. of McWane v. N.L.R.B.*, 92 F.3d 441, 442 (6th Cir. 1996).

In the context of a protracted strike, several categories of strikers are ineligible to vote, including those who have quit or found permanent employment elsewhere, been discharged for cause,[6] or have been permanently replaced. *Battle Creek Health Sys. & Loc. 79*, 341 NLRB 882, 902 (2004); *Lamb–Grays Harbor Co*., 295 NLRB 355, 357 (1989); *St. Joe's Mineral Corp.*, 295 N.L.R.B. 517 (1989); *Crown Chevrolet Co.*, 255 NLRB 826, 827 (1981).

The initial eligible voter list provided by Warrior in response to the petition includes all those bargaining unit employees employed as of the payroll period immediately preceding the filing of the petition. (Tr. 617-19). Warrior's additional list includes all employees who were not on its initial list but who went out on strike on April 1, 2021 and completed the RTW drug test by March 16, 2023. (Tr. 619-25). The combination of the two lists includes all bargaining

[6] The List of 41 are ineligible to vote on the basis of their discharge for strike misconduct. (Tr. 624). The Hearing Officer indicated during the hearing that the Regional Director had already determined that if an election were to be directed in this case, such individuals would be permitted to vote subject to an advance challenge.

unit employees who have a right to vote on the Petitioner's petition and who have not, consistent with Board law, quit or been discharged for cause. Although all bargaining unit hires during the strike were assured by Warrior of their permanent employment upon the end of the strike, no striker has been permanently replaced. (Tr. 619). Warrior and the UMWA agreed upon the necessity of returning strikers completing their drug tests prior to March 16, 2023, and that failure to do so would end their employment with Warrior. (Tr. 98-100; 623-28). For these reasons, such a combined voter list gives full effect to the Board's precedent for ensuring the voting rights of the bargaining unit.

There is no basis under Board law to use a pre-strike relevant period to determine eligible voters. The UMWA would seem to suggest that this should be the case; however, the Board has only applied such a rule in the context of a decertification petition during an on-going strike, and even then, only within one year of the start of the strike provided the striker has not found other permanent employment, been permanently replaced, or been discharged for cause. *See Lamb–Grays Harbor Co*., 295 NLRB at 357; *St. Joe's Mineral Corp*., 295 NLRB at 517. UMWA's strike commenced on April 1, 2021 and lasted well beyond one year before ending on February 16, 2023, well before the filing of the petition. A list of strikers prior to April 1, 2021 is wholly irrelevant to a vote on the Petitioner's petition over two years later.

The combined voter list proposed by Warrior remains broadly inclusive. It may include, for example, individuals who have subsequently quit or been discharged for cause. This is merely a fact of selecting a date in the past to determine voting rights, and could have similar effects on both the first list (those who were on the payroll for the period ending prior to the petition) and the supplemental list (of strikers not already employed who completed their RTW drug test by March 16, 2023). Employees employed during the payroll period ending

immediately prior to the petition may have quit or been discharged for cause since then, and the same may be true for strikers, including the possibility that they have quit or removed themselves from RTW eligibility by not completing one of the additional RTW prerequisites of completing a physical or the ART. Warrior's proposed hybrid list, combining a relevant period payroll list with those returning strikers who completed the initial prerequisite to return to work ensures the broadest right to vote consistent with Board precedent.

B. The Only Reasonable Alternative to Warrior's Hybrid Voting List Is for the Board to Select a New Relevant Period.

Upon the direction of an election in this matter, the Board may reject the parties' proposed methods for determining eligible voters and select a new relevant period that is reflective of the "current labor disputes" and related factors affecting the Petitioner's petition. *See* Nat'l. Lab. Rel. Bd. Casehandling Manual, Part Two, Representation Proc. §§ 11086.3, 11312.1; *see also Heavenly Valley Ski Area*, 552 F.2d at 272 n.1. "A single eligibility date, barring unique and pressing circumstances requiring a different rule, close in point of actual time to [an election] is a reasonable and practicable adjustment in the election machinery to assure a free and just result by avoidance of the opportunity or temptation to manipulate the electorate." *Cone Bros. Cont. Co. v. N.L.R.B.*, 235 F.2d at 40. Such an approach would be reasonable under the circumstances of this case to avoid either the hybrid voting lists or a high volume of fact and circumstance determinations about which strikers found other permanent employment or quit their position with Warrior. As Warrior's HR Manager Sterling testified, other than a few unique exceptions where returning strikers have been accommodated for their personal reasons, the RTW protocol was complete as of the date of the hearing. (Tr. 633-35). Establishing a new relevant period that immediately follows the completion of this RTW protocol would comport

with the Board's long-standing goal of setting eligibility periods in close proximity to election dates.

C. <u>Election Balloting Should Be Conducted Manually, In-Person, and On-Site</u>.

"The Board's longstanding policy is that representation elections should, as a general rule, be conducted manually." Nat'l. Lab. Rel. Bd. Casehandling Manual, Part Two, Representation Proc. § 11301.2 (2020); *see also Aspirus Keweenaw*, 370 NLRB No. 45, *3 (Nov. 9, 2020) ("[T]he Board has a long and proud tradition of conducting elections by manual balloting.") (citing *London's Farm Dairy, Inc.*, 323 NLRB 1057, 1057 (1997)). Although the Board's precedent includes authority to conduct balloting by mail where extraordinary circumstances—including the recent COVID-19 pandemic—warrant necessary alternatives to ensure eligible employee access to voting opportunities, none of those extraordinary circumstances exists in this case.

Among other extraordinary circumstances considered by the Board for directing a vote by mail would be the pendency of an on-going strike, the widespread geographic location of employees, or the wide and varied composition of work shifts. The testimony in this case establishes no such extraordinary circumstances here. There are no pending health or safety considerations. Warrior's employees work only two shifts with approximately six distinct locations. (Tr. 635-41). Bargaining unit employees are familiar with the balloting locations proposed by Petitioner and have voted on site for their own Union leadership at these locations in the past. (Tr. 641-42). These locations are situated at well-known and accessible sites that would allow for balloting under laboratory conditions. (Tr. 642-43). With at least 41 potential challenged ballots already known to the parties, the presence of a Board agent to supervise in-person voting is also important to a fair and just outcome in this matter. *See Aspirus Keweenaw*,

370 NLRB at *3 ("Given the value of having a Board agent present at the election—a circumstance which is not possible in mail-ballot elections—the Board's longstanding policy is that representation elections should, as a general rule, be conducted manually…").

VI. CONCLUSION

Although Warrior's interests in this matter are customarily limited to facilitating the exchange of information necessary for the Board to do its work in response to the employees' petition, Warrior has no choice but to advocate for itself in the face of unfounded Union accusations with several ULPs still pending. Based on the record evidence, including all the evidence of which the Region will take Judicial Notice, Warrior respectfully submits that the Union has failed to establish a sufficient causal nexus to warrant dismissal of the Petition. Warrior stands ready to facilitate the Board's election order.

Respectfully submitted this the 5th day of June 2023.

/s/ *David M. Smith*
David M. Smith
John B. Holmes, III
Matthew W. Stiles
Maynard Nexsen, P.C.
1901 Sixth Avenue North, Suite 1700
205-254-1000
dsmith@maynardnexsen.com
jholmes@maynardnexsen.com
mstiles@maynardnexsen.com
Attorneys for Warrior Met Coal Mining, LLC

CERTIFICATE OF SERVICE

I certify that on the 5th day of June 2023, I emailed a copy of the foregoing to the Hearing Officer and the following parties of record:

John Mooney
Mark J. Murphy
Mooney, Green, Saindon, Murphy & Welch, P.C.
1920 L. St. N.W. Suite 400
Washington, D.C. 20036

George N. Davies
Richard Rouco
Quinn, Connor, Weaver, Davies & Rouco, LLP
2 20th St. N.
Birmingham, AL 35203

Thomas W. Scroggins
Burr Forman LLC
420 North 20th Street
Suite 3400
Birmingham, Alabama 35203

Kevin F. Fagan
United Mine Workers of America
18354 Quantico Gateway Drive, Suite 200
Triangle, VA 22172

/s/ *David M. Smith*
OF COUNSEL